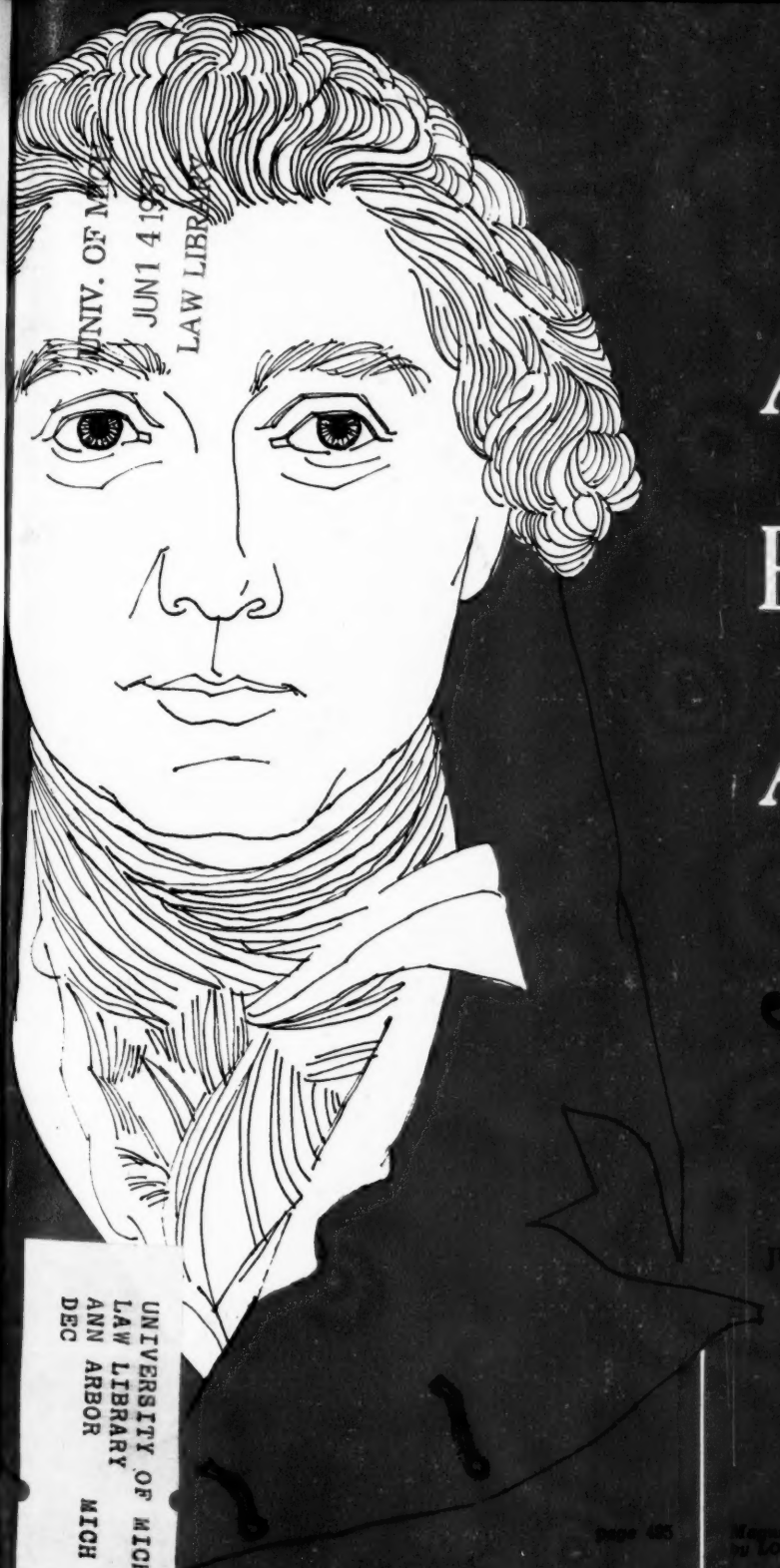
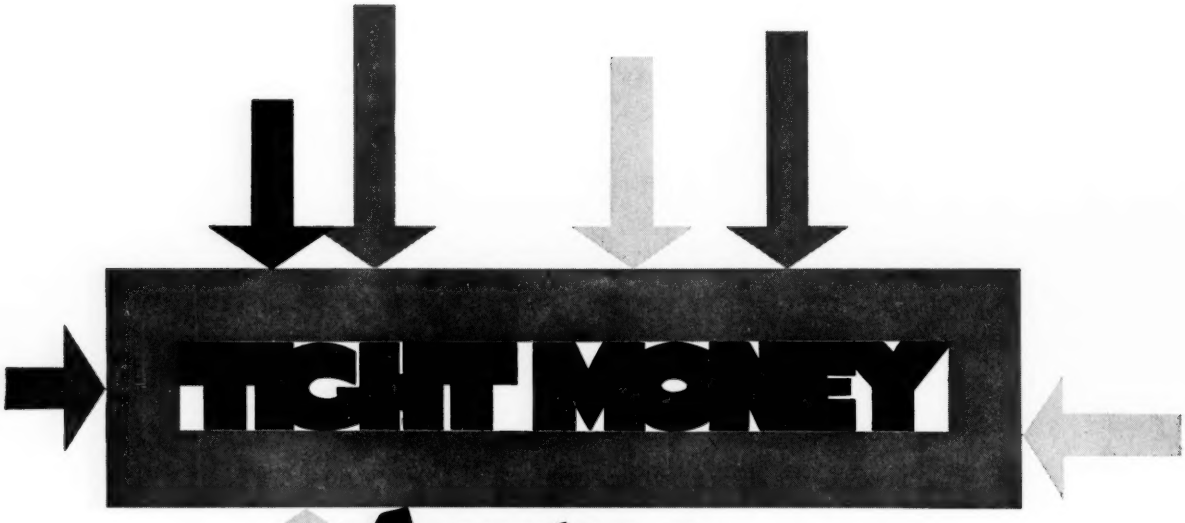






# American Bar Association Journal

JUNE 1957 • Volume 43 / Number 6

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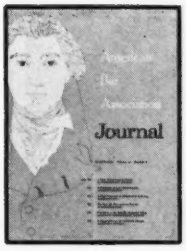


## *This Month's Cover*

The features on our cover this month belong to Lord Eldon, Lord High Chancellor of England, born on June 4, 1751. Called to the Bar in 1776, he made his name in the leading case of *Ackroyd* v. *Smithson*, which he appealed in spite of his client's opposition. In 1788, he became Solicitor General, in 1793 Attorney General, and in 1799 he was made first Chief Justice of the Common Pleas and then Chancellor. He served as Chancellor for twenty years and exercised great influence over the law of equity, particularly in developing the use of the injunction. A profound conservative, his great fault as a judge was his slowness. He died in 1838.



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# The President's Page

**David F. Maxwell**

For some time I have been deeply concerned by the insidious process which has been gradually eroding our right to trial by jury in civil cases. The right to trial by jury is firmly imbedded in the American system of jurisprudence and is as old as the country itself. Reference to it is found in the Declaration of Independence, which deplores the abuses and usurpation by George III "depriving us in many cases of the benefits of Trial by Jury". Article VII of the Bill of Rights guarantees trial by jury "in Suits at common law, where the value in controversy shall exceed twenty dollars".

Yet, during the past half century, bit by bit, there has been a whittling away of jury jurisdiction. Arbitration has replaced the jury trial in many areas, notably in the motion picture, building trades and textile industries, and generally in the field of labor law.

Various administrative bodies and tribunals, both on a federal and state level, are determining the rights of citizens in a manner affecting their everyday lives, without the benefit of juries. In Saskatchewan, Canada, such a board is vested with authority to award damages in automobile accident cases on the basis of liability without fault, and there are many authorities in this country advocating the adoption of a similar system here. The Compulsory Arbitration Act in Pennsylvania, adopted in 1952, provides that the trial court may, by appropriate rule, substitute arbitration for trial by jury when the amount in controversy is $1,000 or less, and the constitutionality of the act has been upheld by the Supreme Court of that state.

The extension of this plan to all civil cases is being seriously urged by no less eminent jurists than David W. Peck, Presiding Justice of the New York Supreme Court, Appellate Division, First Department, and C. Campbell McLaurin, Chief Justice of the Supreme Court of Alberta, Canada, on the theory that this is the most effective way to attack clogged dockets.

Personally, I have never subscribed to this doctrine. To me, it is more important to preserve the fundamental right of trial by jury than it is to dispose of cases in a hurry. Furthermore, I doubt whether the jury trial is primarily responsible for court congestion; if so, how can you account for the delays in disposing of cases on appellate dockets in certain states?

So, it was encouraging to me to hear William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, in addressing the Regional Meeting in Denver last week, express a similar point of view. Justice Brennan advocated reorganization of the courts and the introduction of pretrial conferences as effective ways in which to relieve calendar congestion. With reference to the part the jury trial plays in the disposition of court calendars, he had this to say: "Another nostrum is that, because jury trials take more time than trials before a judge without a jury, the easy answer to calendar congestion is to get rid of jury trials in automobile accident cases. . . .

"I think, at all events, this proposal to abolish jury trials in automobile accident cases also faces an almost insurmountable hurdle. The success of our British brothers in abolishing jury trials should not mislead us. American tradition has given the right to trial by jury a special place in public esteem that causes Americans generally to speak out in wrath at any suggestion to deprive them of it. Perhaps the emotion generated by proposals to modify or deny the right has its roots in the Jacksonian era of distrust of the legal profession and the insistence upon the people's control of the administration of justice. Perhaps it is a survival of the same sentiment which gave us the elective system of judges in most states and in some, as in my own, New Jersey, actual lay participation on the bench. One has only to remember it is still true in many states that, so highly is the jury function prized, judges are forbidden to comment on the evidence and even to instruct the jury except as the parties request instructions. The jury is a symbol to Americans that they are bosses of their government. They pay the price, and willingly, of the imperfections, inefficiencies and, if you please, greater expense of jury trials because they put such store upon the jury system as a guaranty of the preservation of their liberties. The road of him who would take away jury trial in automobile accident cases is a long and rocky one."

As Justice Brennan so eloquently points out, trial by jury plays a much more important a part in our American scheme of things than simply determining the rights of litigants.

*(Continued on page 536)*

# Views of Our Readers

**▪ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

## *He Disagrees with Mr. Daniel*

In his recent article (43 A.B.A.J. 118), Mr. J. Reese Daniel, of Columbia, South Carolina, takes me, among others, to task for advocating the recognition (and, necessarily, regulation) of specialization in law.

Mr. Daniel is apparently even more of a newcomer to the profession than I am. His article implies that he is a general practitioner in a smaller community. To bolster his thesis, he calls upon great men of the past who were members of our noble profession before the advent of the automobile and the administrative agency, to cite only two of the sources for our present need for specialization. Does Mr. Daniel know that the great Samuel Tilden wrote his own will, embroiled his estate in memorable litigation which was totally unnecessary? Has Mr. Daniel heard of William Jennings Bryan's interesting endeavors in the field of estate planning? Does Mr. Daniel forget that there have been such specialists as admiralty proctors, equity barristers or patent attorneys in the remote and presumably respectable past; that in Blackstone's day as now, an English barrister was responsible to the solicitor who had retained him, not to the litigant?

There are eighteen specialized listings in the current Martindale-Hubbell directory for Columbia, Mr. Daniel's city. They probably identify the most successful practitioners there, who are specialized on one ground alone: they *say* they are. In most cases, that self-serving statement is true enough: the firms so listed *probably* know more about their field than almost anyone else in town. Is that information sufficient and trustworthy?

NACCA and other similar groups are open to "specialists" on mere payment of dues. In many cases, business forwarded in reliance on membership in such groups reaches inexpert hands. Why not then recognize the existence of "specialists" and limit the label to those who can show competence, acquired by practice or study? Mr. Daniel urges us to raise the standards of legal education. Surely he must know that most of the better law schools have graduate divisions doing a fine job of preparing young lawyers like himself and me for specialties, only to have the American Bar Association deny them the fruits of their hard earned competence.

Mr. Daniel dislikes doctors and birdies. As to the latter, my golf scores will not allow me to discuss them. As to doctors, any of the many Columbia insurance men will tell Mr. Daniel that the *specialized* medical profession of today has far outpaced the old-time G.P. in keeping us alive. Further investigation will disclose that the present day G.P. of outstanding caliber has usually earned the diploma of the Board of Internal Medicine and thus can be distinguished from men of more limited accomplishments.

Mr. Daniel is fond of finding syllogisms and demolishing them (page 118, column 2; page 119, column 1; page 120, column 2). From statistics he has mentioned, I offer this: lawyers in large firms make more money than those in small firms; large firms generally are departmentalized according to specialties, and in many cases, the entire firm limits its practice to one field, even to one administrative agency; *ergo,* specialized lawyers generally make more money than general practitioners.

Alas, in all but the smallest communities, the day of the jack of all trades, be he carpenter or lawyer, is gone. I mourn it, but my grief does not prevent me from recognizing its demise. The busy negligence lawyer cannot hope to find the time to master the field of security regulation. The public knows that the lawyer in general practice may have deficiencies. No reliable avenue to the qualified specialist is open to the general practitioner. Whether or not to open one is the issue.

Whether Mr. Daniel likes it or not, the public needs the services of law specialists. Those services are provided (in many instances, adequately, let us admit it) by accountants, insurance agents, brokers and marriage counselors, who care not one whit about Blackstone or Littleton, though they may like "Coke" and "More".

JOSEPH DE CHIMAY

Washington, D. C.

## *Mr. Daniel Replies to Mr. de Chimay*

I read Mr. de Chimay's letter with a great deal of delight. I was beginning to think there was no opposition, and I do hate to tilt at windmills.

My worthy adversary implies that only we small town lawyers can still engage in general practice. He refers to Columbia as a "smaller community". Smaller than what? Washington? It is the largest city in South Carolina and I don't know how I could go any higher and remain on hallowed ground.

*(Continued on page 488)*

*published monthly*

# American Bar Association Journal

*the official organ of the* American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $5.00; Municipal Law, $3.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $5.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois.

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As a lawyer, you probably are engaged, with increasing frequency these days, in discussions concerning financial aspects of your clients' businesses.

We believe, therefore, that you will be interested in reading a brief article which explains how *factoring*—a specialized form of commercial financing—is solving many credit and financial problems arising from today's competitive conditions. The article, entitled **"Modern Factoring and How It Meets Today's New Financial Requirements,"** is a reprint of a public service advertisement which originally appeared here in the Journal. The information it contains may well find current application with many of your own clients.

Reprints of the article are available, without cost or obligation, to members of the legal profession. If you would like additional copies for your files, please indicate the quantity. Address your request to Mr. Walter M. Kelly, President, Commercial Factors Corp., Two Park Avenue, New York 16, New York.

*(Continued from page 484)*

I have letters of concurrence from fellow hicks in the hinterland such as Seattle (population 467,591); Jacksonville (population 204,517); Baton Rouge (population 125,629); as well as Greenville, South Carolina (population 58,161), from which latter crossroads Mr. de Chimay fled to make his way in the big city.

We thank Mr. de Chimay for mourning our passing, but for his information there are an awful lot of us out here in the sticks who don't know we're dead yet.

J. REESE DANIEL
Columbia, South Carolina

### *Mr. Daniel's Article Filled Her with Pride*

Huzzas for Mr. J. Reese Daniel!

His article, "A Noble Profession", in the February issue of the JOURNAL fills me with greater pride after reading it.

I shall have to restrain myself from climbing the highest hilltop to proclaim to the world below:

Ours *is* a nobler profession,
Simply because we lack specialization!

HELEN MEJAN
Boston, Massachusetts

### *We Are All Specialists— A Reply to Mr. Daniel*

I have read with much interest the many articles and letters, pro and con, regarding specialization in the law, the most recent in the February JOURNAL by J. Reese Daniel. I am a specialist—or—to put it another way—I am an attorney and counselor at law whose practice is predominantly in the field of patents, trademarks and unfair competition. My practice, though concerned primarily with a particular class of property and conflicts, directly or indirectly intersects every other phase of the law at one time or another. In this respect I believe that I am no different from any other lawyer who, by dint of chance, association or choice (unusual) is building a practice in some particular phase of the law, be it probate, personal injury, corporation, tax, labor relations or any one of the other many phases of the law. . . .

Every lawyer, by the very nature of the thing, is specializing in a field of law in which he has obtained experience or special training and by reason of which he tends to attract that type of case. Brother J. Reese Daniel is one of these. He is one of these because neither he nor any other lawyer can possibly keep up with all of the day-to-day changes and interpretations in all phases of the law. . . . Even though he may turn to the books for further enlightenment, he cannot possibly give his client the equivalent of advice based on years of background and experience dealing with that particular type of legal problem. Would Brother Daniel retain a medical doctor whose experience was mainly in delivering new-born babies to perform serious heart or brain surgery upon himself?

*(Continued on page 490)*

*(Continued from page 488)*

The general practice idea is in the law essentially a selfish concept, because it usually grows from the seed of desire to acquire a greater volume and a broader scope of law cases. Brother Daniel completely ignores the very real fact that a law practice grows only through successful experience and that no single individual has a life sufficiently long to gain successful experience in each and every phase of the law. We are all specialists. The differences, if any, are differences in degree, not kind. There is no such animal as a qualified, all around, general practicing attorney.

Now, facing up to the situation as it is and not as some of us would like it to be, we can begin to work towards a realistic solution of some of the problems that are inherently present in specialization. The most serious problem, in my opinion, is the unwillingness of many members of the Bar to recognize and accept specialization as a natural and inevitable step in the evolution of the practice of law, just as it is natural and inevitable in the fields of engineering, medicine and others. The inevitability may be questioned but, how can it be otherwise when the fund of knowledge is increasing by leaps and bounds each year, whereas the normal life span remains relatively fixed? Only after such recognition and acceptance can we begin to see that the other problems in specialization are relatively minor and capable of ready solution. Only then can the Bar overcome the selfish approach to the practice of law and consider ways and means of rendering better qualified legal service to the public. One major step in the right direction would be the development of suitable standards for the particular specialties. Another would be the provision of an open door from the public to the specialties. If the public had knowledgeable access to the specialties they wouldn't feel as though they were being sent after a left-handed monkey wrench when referred to the specialist as Brother Daniel suggests is the case under present conditions. . . .

JEROME F. KRAMER
Cleveland, Ohio

### *He Thinks Mr. Daniel Built a Straw Man*

Some see a controversy as a conflagration to be checked by the setting of another fire; others recognize it as a dark room to be illuminated by reason. Mr. Daniel, in "A Noble Profession: A Retort to Our Critics Within the Bar" (43 A.B.A.J. 118, February 1957), has built a bonfire out of a straw man which, to my mind, adds little to the understanding of the problem of specialization.

The man of straw burned by Mr. Daniel is this: that the chief reason advanced for specialization in the practice of law is that physicians specialize. To demolish this "argument", Mr. Daniel finds it necessary to attack the achievements of the

*(Continued on page 492)*

*(Continued from page 490)*

medical profession, to rally our own against "trying to ape the medics", and to call for loyal legions of the law who will refuse to "imitate some alien group".

Just as logic is the science of reason, so criticism is its guardian. The abandonment of the former to emotional appeals is usually accompanied by an attack upon the latter. Mr. Daniel's indifference to the form of logic is suggested by the contours of two analyses which he describes as "syllogisms". His indifference to the content of logic is demonstrated by his argument that because lawyers were "formulating great principles of law while surgeons and physicians were still barbers and bloodletters", the intraprofessional allocations of function practiced today by physicians cannot be superior to those of lawyers. This is followed by the suggestion that the election of many lawyers to public office indicates public satisfaction with non-specialization by lawyers.

The first and perhaps the only loyalty which criticism may properly recognize is loyalty to reason. The idea that critical examination of the methods of our profession in comparison with those of others is disloyal, is subversive of reason. Whether or not guidance can be obtained from the practices of other professionals, let us by all means look to them for suggestion. The growth of specialization in the professions is a recognition of the flowering of knowledge and techniques to a point beyond the ability of one man to tend properly the whole luxuriant garden. Whether it is welcomed or bewailed, it would seem to be inevitable. Rather than decrying it either because Coke did not know it or Osler did, we should be considering how best to use and control it.

DANIEL C. BLOM
Seattle, Washington

### *The Bishop Asbury Cottage in West Bromwich, England*

I have recently heard from the Secretary of the Law Society in London of the arrangements being made for the forthcoming Convention of the American Bar Association to be held in London in July of this year. I imagine that the opportunity will be taken by a large number of the visitors to come to the Midlands where there is, of course, so much of interest for them to see, particularly at such places as Stratford-on-Avon.

I would like to take the opportunity of reminding you of the unique opportunity which your members may have of visiting the boyhood home of Bishop Asbury, so very well known amongst Methodists in America. The original Asbury Cottage is situated in West Bromwich, and I am proud to be able to tell you that it has recently been acquired by my Council for the purpose of being preserved to posterity. The World Methodist Council has been kept very fully informed of the negotiations which have been going forward in connection with this matter, and I have no doubt that you will be interested to learn that the building is now protected by the provisions of the Town and Country Planning Act, 1947, as it has been designated by the Minister as a building of special historic interest, and this protection, coupled with the ownership of the Council, will now ensure that it is available for those who have a very special interest in the name and achievements of this famous gentleman. . . .

The premises are at the present time occupied but the family is most anxious and willing at all times to welcome visitors from abroad, and indeed over the years many such persons have visited this spot, and I am drawing your attention to this so that in any advance publicity which you are preparing for your members, a note of the facilities which are available in West Bromwich should be included.

May I say how very much the town would personally look forward to visits from members of the Convention, and if any of them should decide to come along, and they will let me know, I will do my best to arrange for their reception here and for an escort to the Asbury Shrine. I know that Mr. Mayor would be anxious to have the opportunity of meeting any of the members of the Convention who were able to come to West Bromwich at a time when he was otherwise not actually engaged. . . .

J. M. DAY
*Town Clerk*

West Bromwich
England

### *The Behavior of Juries in Negligence Cases*

I have just concluded reading "Comparative Negligence: Let Us Hearken to the Call of Progress" by

*(Continued on page 516)*

# Magna Charta Documents:

# The Story Behind the Great Charter

by **Louis Ottenberg** · *of the District of Columbia Bar*

**When the American Bar Association convenes in England next month for its Eightieth Annual Meeting, an important part of the ceremonies in connection with the meeting will be the dedication of a monument at Runnymede, near Egham in the County of Surrey where, on June 15, 1215, King John gave his assent to the Great Charter, a document that is as important to American legal history and to the American people as it is to the British who made it a part of the law that the New World inherited. Mr. Ottenberg relates the story of John and his struggle with the Pope and the role of Stephen Langton, Archbishop of Canterbury, who mobilized the barons against their King.**

In an exhibit case in the British Museum, London, is one of the four "original" copies of Magna Charta. In that same case are three other original documents all of which have a direct connection with the Great Charter: 1. a Papal Bull of April 21, 1214; 2. the "Articles of the Barons", and 3. a Papal Bull of August 24, 1215.

Few indeed are the Americans who know anything about them. Fewer still have read them in the original script, or in Latin translation or even in English. Yet together they reflect one of the most important episodes in the history of free people. All were written during the turbulent reign of King John of England (1199-1216).

The earliest of the documents is a letter, a Papal Bull, dated April 21, 1214, from Pope Innocent III to King John.[1] What occasioned it?

Hubert Walter had been Archbishop of Canterbury for many years. As such he had been also the Primate of England, one of the King's closest advisers, vested with tremendous temporal as well as ecclesiastical authority. He had died in July, 1205.

Following a long-established custom, the monks of Christ Church, who formed the Chapter of Canterbury Cathedral, nominated his successor. They chose Reginald, their Abbot. But they did this secretly, without consulting and without the knowledge of the King. Not all of them participated in the election. By practice, the Chapter might not hold an election of an Archbishop until it had received permission of the King. The King was seldom in a hurry to grant such permission because he was entitled to the revenues of the Cathedral during the vacancy caused by the death or removal of the archbishop. A delay of a year was not uncommon. The monks sent their representatives post-haste to Rome for papal approval.

When John learned of this he flew into one of his not uncommon rages, literally. He wanted a "king's man" rather than a "pope's man". He wanted John de Gray, Bishop of Norwich. He coerced a minority of the monks of Christ Church and the Bishop of London and the suffragans of Canterbury to nominate his candidate. Proponents of this selection were then dispatched to Rome. Then John wrote his protest directly to the Pope complaining against Reginald's election.

The Pope refused to recognize the election of Reginald on the ground of its informality, or that of John de Gray on the ground of irregularity. He personally commanded the monks of Christ Church then in Rome as representatives of the majority to select his friend of many years, Stephen Langton, an Englishman. Innocent elevated Langton to a cardinalship in 1206, and established him in Rome pending his return to England as Archbishop of Canterbury.

Everyone, of course, accepted the Pope's selection of Langton, that is, everyone except John. After all, he was King of England and claimed that he was entitled to some right in

1. Latin and English versions in SELECTED LETTERS OF POPE INNOCENT III CONCERNING ENGLAND (1198-1216), edited by C. R. Cheney and W. H. Semple, pages 177-183; hereinafter referred to as "LETTERS".

the matter; the Archbishop was his Primate. He refused to permit Langton to land in England; threatened imprisonment for him.

Defying the Church in those days was serious business. At first, the Pope tried persuasion. That failed. Then, in March, 1208, the Pope put all of England under an interdict which remained in force until 1214. "Office divina", public religious services, were stopped throughout the realm, administration of the sacraments, except "baptism of infants and the confession of the dying", was suspended. No ringing of the church bells, not even the rites of Christian burial were permitted. John persisted to thwart the Church; it was a declaration of war between himself and his Pope, "regnum versus sacerdotium".

John was excommunicated in 1209. That failed. Then the Pope absolved the people of England, and especially the peerage, from the oath of allegiance and homage to their King, and directed them not to support him but "begin loyally and wisely to combat the King's purpose". All those papal acts were explained at the doors of the churches throughout the realm.

John retaliated. He engaged in a more or less systematic seizure or confiscation of ecclesiastical income and property, cash, real estate and even the sacred (but valuable) objects within the churches. As he grew richer he became more contumacious.

Finally the Pope deposed John as King and granted all his dominions to Philip, King of France, and authorized him to invade England, thereby supplementing an invitation of some of the leading magnates of that country. France began preparations to take over the kingdom across the Channel.

The patience of the Pope, of the barons and of the people was quite exhausted by John's tyranny, taxes, arrests and confiscations; but most of all by the suspension of divine services.

Years had now elapsed since the death of Hubert Walter, the old Archbishop. Unrest and even rebellion were rife and invasion threatened. The King's support was rapidly disappearing.

King John may have been stubborn, but he was no fool. Indirectly at first, then directly, he opened negotiations with Innocent. They were long and tortuous negotiations. The Pope basically required three things: first, he wanted John to recognize the right of the Church to select and install its Archbishop and to manage its own ecclasiastical affairs; next he insisted that John make full restitution of the church property and revenues he had seized; and finally he required John to promise not to punish anyone who had obeyed the papal decrees and to rescind his orders outlawing priests and others for performing those decrees.

On his side, John wanted to prevent the French invasion, the defection of baronage and people, and a mitigation of the financial demands of Rome.

Finally in 1213, in response to John's "urgent petition", the Pope sent his legate to England to work out details. John recognized the rights of the Church; he prostrated himself before the papal envoy and surrendered the kingdoms of England and Ireland to the Church and received them back as the Pope's vassal, taking the oath of a feudal liegeman to the Holy See. In writing he bound himself and his successors to hold the kingdom by that tenure, agreeing to pay annually one thousand marks sterling in addition to "Peter's Pence", a levy of one penny on each household in the realm. The financial demands of the Church were to depend upon an accounting —then the reckoning.

It was a complete pontifical triumph, except that John, with his accustomed cunning, left himself an avenue of escape, a "saving clause". In his official letter to the Pope he made his acts "subject to the maintenance for us and our heirs of our jurisdiction, privileges and regalities". By this precaution he was afforded an excuse, if occasion arose, to treat the whole transaction as a nullity, an empty form, just because the saving clause was so broad and indefinite.

The excommunication was lifted, but the interdict remained for the time being; the financial transactions were unsettled.

John was now a vassal of the Roman Church. He was in good standing and ruling over a kingdom "within Peter's Patrimony". To attack him would have been a sin. He felt that neither the King of France nor the baronage of England could move against him.

## The Papal Bull . . . *April 21, 1214*

That was the status of things when the Pope wrote John the Papal Bull of April 21, 1214. It was signed by Innocent III and countersigned by fourteen cardinals.

It was a long document and quoted in full the King's official letter dated October 3, 1213, and his oath of homage. The Pope stated that "as every knee is bowed to Jesus, of all things in heaven and things in earth, so all men should obey His Vicar", therefore "all secular kings for the sake of God so venerate this Vicar that unless they seek to serve him devotedly they doubt if they are reigning properly".... "You (John) have decided to submit in a temporal sense yourself and your kingdoms to him (the Pope) to whom you knew them to be spiritually subject". In pursuance of this submission, "you by a devout and spontaneous act of will and on the general advice of your barons have offered and yielded in the form of an annual payment of a thousand marks, yourself and your kingdoms of England and Ireland, with all their rights and appurtenances, to God and to SS. Peter and Paul, His apostles and to the Holy Roman Church and to us and our successors, to be our right and our property."

The full import and significance of this papal bull will become most evident after considering John's reluctant and perfidious grant of Magna Charta the next year and his prompt breach of its terms. John

was never a religious man; in fact he was well known as "the devil's disciple". Dr. Stubbs said of him "This King was as cowardly in Adversity as he was insolent in Prosperity". The ancient annalist Roger of Wendover said that John had almost as many enemies as he had barons.

## The Next Document . . . *The Articles of the Barons*

The next document in the exhibit case is called the "Articles of the Barons". It bears no signatures. Written at the top of the page are the words: *Ista sunt Capitula quae Barones petunt et dominus Rex concedit* (These are the Articles which the Barons present and the Lord King grants.)

These articles were in fact a compilation, a restatement of rights and privileges, of royal abuses and violations of ancient customs and liberties. The common people were poor and helpless against the intrusions of the Crown. But the barons, the magnates, were rich and powerful. John was robbing and taxing both classes. He encroached upon one of the most cherished rights of the peers, the right to hold trials in their own courts—a source of control over their estates and also a profitable source of revenue from fines and costs. Individually even the barons could do little. Acting in combination they could be most effective. And combine they did.

It will be recalled that John had agreed to receive Langton as Archbishop. A few days after he landed in England in July, 1213, with four or five exiled bishops who accompanied him, the Archbishop met John at Winchester. There, in the Old Minster, the King was absolved from his excommunication. This was done by the Archbishop under papal authority. There too Langton required John to swear publicly that he would perform his agreement with the Church. And he was required to take a further solemn oath—that he would restore the good laws of his forefathers, especially the laws of King Edward the Confessor, and that he would annul all the bad laws and judge all men according to just judgments in the courts. He swore further and probably most important of all, that he would restore to every man his rights.

Langton was determined to use his temporal and his clerical powers to correct the King's abuses against the Church and against the subjects of the realm. John, then in dire straits, also determined to use his new Primate as a peacemaker to secure the "tranquillity of the realm".

Langton was soon afforded the opportunity to act in both capacities as defender of the Church, the King and the people.

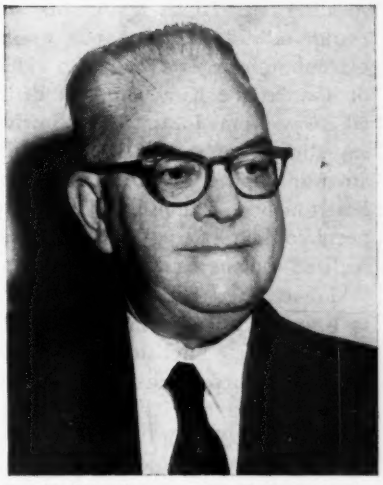
The barons, particularly those of northern England, had refused to fight for or with the King in his proposed invasion of Poitou in France, claiming that their feudal obligation to furnish military aid and service applied only to England and not "beyond the sea". They also refused to pay scutage, the charge levied under feudal law in lieu of military service, claiming that this was due only in case of failure or refusal to render such service in England.

John, with utterly inadequate forces, started on his expedition to Poitou, hoping that his barons would change their minds and follow him with their own armies or pay the scutage so that he could hire and pay mercenaries. The barons did neither. John reached the channel island of Jersey, and then turned back to England in one of his fits of rage. Almost at once he announced his purpose to set out for the north to punish his recalcitrant nobility.

Meanwhile Langton had gathered a council of prelates and magnates at St. Paul's Cathedral in London. There he told them that he had found a copy of what purported to be the coronation charter of liberties granted in 1100 by John's own great-grandfather, King Henry the First of England—the "Lion of Justice". This charter had been violated repeatedly by Henry's successors Stephen, Henry II, Richard and John. But it contained the royal promises to free the Church of unjust exactions and to free the laity from all evil customs, and to restore the good laws of Edward the Confessor with such reasonable changes as had been made by William the Conqueror. It was detailed and specific. It lent itself readily as a basis for the situation then confronting the country—Church, peers and other laity.

In any event Henry's charter—whether genuine or not—afforded the new Archbishop his opportunity to intervene, to protect rights and to insist that the King observe the oath he had taken so recently. It also enabled him to follow papal instructions to bring about a peaceful settlement of the pending dispute between King and baronage.

Langton overtook John on his punitive expedition northward. The King was not impressed by the overtures of his Primate, and in effect told him to keep out of temporal affairs. He continued northward. So did Langton. The King was obdurate; the Archbishop was persistent. He had been forbidden by the Pope's written instructions from excommu-



**Louis Ottenberg engaged in extensive private law practice in the District of Columbia for forty-five years until his retirement in 1956 to devote his entire time to historical and legal research, writing and travel. It was his suggestion that led the American Bar Association to erect the monument at Runnymede which will be dedicated during the London portion of the Annual Meeting next month.**

nicating the King again. But he could and did declare that he would excommunicate everyone who aided or abetted the King. Support drifted away from John. The punitive expedition was ended. The immediate war on the baronage was over. Langton had demonstrated that the peers could rely upon him, and he realized that he could control them.

Shortly after that John went over to France with an army of mercenaries and a few English. There, after some little success, he was decisively defeated at the crucial Battle of Bouvaines (July 27, 1214). It was catastrophic. He lost practically all of his holdings in France. "The bones of his father, his mother, his brother and his ancestors reposed forever in the custody of a foreign power. John never again saw the shores of France."

By the middle of October, 1214, he sailed back to England—to England and serious grievances with his Church and his people. He had not paid the Church for his depredations. The interdict had not yet been lifted. His baronage was restive from demands by the King's Justiciar, sheriffs and collectors of taxes and dues and scutage. Fourteen months had elapsed between the Archbishop's return to England and the King's return from France. During eight of these months, Peter des Roches, the King's Justiciar, had ruled with "a rod of iron", with tyranny and corruption and contempt for the rights of Church and people, high and low.

All that now faced King John. He was in a most villainous mood to say the least. Certainly this was no time to demand liberties, relief and definite assurances from this King.

But the Archbishop was determined that the promises of the King be fulfilled and the rights of "all men" should be restored. His instrumentality was the baronage. By their power and strength alone could the result be accomplished. The basis of action was the charter of Henry I, even though it did not even mention scutage or military service overseas. However it opened the door to the necessary reforms.

Right after Christmas John met his baronage in a body "furnished for battle". John resorted again to his old method of procrastination. He responded to the importunities of the assemblage that "the matter which they sought was great and difficult", wherefore he asked for a delay till the close of Easter that he might consider how to satisfy both their demands and the dignity of his crown. April 26, 1215, was agreed upon. But he continued to make his warlike preparations. So did the peers.

John sent his appeals to Rome. He reminded the Pope that it was the obligation of the Church as overlord to protect its vassal. He said he would take the "Crusader's Cross"—well knowing that crusades against the infidels holding the Holy Land were pet projects of the Pope. They also cost a lot of money which John did not have. He complained that the baronage had refused to furnish requisite military service or pay proper scutage, all in violation of their ancient and accepted obligations. But worst of all, the peers were combining against him.

The barons also sent envoys to Rome. They told of the shocking conditions created or countenanced by the King.

By a series of letters about March 19, 1215, the Pope exhorted all—King, barons and especially Stephen, his Archbishop, "to appease and reconcile". These letters were sugar-coated but crystal-clear that the Church would punish by excommunication or interdict all who failed or refused to follow the papal admonition.

Perfidious John took the Crusader's Cross on Ash Wednesday, March 4, 1215. He was now "sheltered beneath ecclesiastical protection". But he was committed to lead an army to the Holy Land.

The baronage was not deceived. It knew that John did not possess a crusader's religious zeal, nor did he have the financial ability to conduct an expedition. Judging from the Papal Bull of August 24, 1215, Innocent still trusted John and his proposed crusade.

Even before April 26, the day all had appointed for a settlement of grievances, the King was trying his utmost to recruit his domestic forces. So were the peers. They gathered with armed supporters at Stamford in Lincolnshire. They advanced on Northampton. Then on to Brackley, not far from the King who was at Oxford.

John sent his Primate and William the Marshal, Earl of Pembroke, both his strongest and most influential negotiators, to "demand a farther account of those laws and liberties which were so earnestly desired".

These were scheduled in what we now know as the "Articles of the Barons". These Articles were undoubtedly inspired and perhaps prepared under the direction of Langton himself. They were delivered to the royal messengers with an assurance to the King that a refusal to grant the laws and liberties demanded would result in the prompt seizure of his castle-fortresses. The peers knew the truculence of John. So the coalition of the barons—one that might disintegrate almost instantly—selected a powerful leader to hold their forces together. With Bedford Castle in their possession, they poured into London after secret arrangements had been completed there. They also sent circular letters to some of John's firmest supporters and to other magnates who tried to remain neutral. Demand was made for assistance against the King, and promising attack against the castles and estates of those who failed or refused to co-operate.

It was now May, 1215. John realized that further delay was useless. Furthermore much of his support was vanishing. He sent a message to the opposing baronage that he was ready to concede their demands.

## The Charter Granted . . . *June 15, 1215*

A meadow beside the Thames River between Staines and Windsor, an old council ground called Run-

*(Continued on page 569)*

# After Eight Years:

# New Jersey Judicial Reform

by **William J. Brennan, Jr.** • ***Associate Justice of the Supreme Court of the United States***

**In 1947, after a long campaign for reform, New Jersey scrapped its 103-year-old court structure and replaced it with a new, streamlined judicial system utilizing the principles of business management. Placed at the head of the new Supreme Court was the leader of the battle for reform, Arthur T. Vanderbilt, Dean of the New York University Law School and a former President of the American Bar Association. Mr. Justice Brennan, himself a former member of the New Jersey Court, reviews the eight years of judicial administration in New Jersey since the new system was adopted. He finds that the results prove the soundness of the theories upon which the New Jersey court system was built. The article is taken from an address delivered before the Constitutional Convention Association at Princeton last December.**

New Jersey feels a deep pride in a judicial system usually acknowledged to be America's best. Every feature of its modern court structure is embodied in a single article of six short sections and twenty-seven pithy paragraphs of the 1947 Constitution. The structures of some of the states have some of those features. Only New Jersey's structure has all of them.

A basic determination underlay the change from our former system. It was that our modern complex economy and society could no longer tolerate a court system of autonomous courts free from any sort of control from within or without, the judges concerned with their own court only and brooking no interference from judges of other courts, or indeed even from members of their own court. New Jersey borrowed from industry and commerce one of America's great contributions, namely, the principles of business management which have done so much to advance this nation to the place of the world's greatest productive economy. The framers of the 1947 Constitution created a simple unified judicial system, giving the Supreme Court exclusive authority over its administration under the executive leadership of a principal executive officer, the Chief Justice of that court. Flexibility for the system was ordained by vesting in the Chief Justice the power to assign judges according to experience, ability and need, and apportion judicial business among the courts, divisions and parts according to the volume and type of cases. The aim was threefold: (1) to abolish jurisdictional controversies which delay justice and waste the time and money of litigants and courts; (2) to assure that judicial resources would be fully utilized and litigation promptly decided; (3) to secure businesslike management of the courts through a single administration for all of them as integral parts of a single whole.

The framers were fully aware that in what they did they were providing for a new kind of judge. They recognized that the judicial department, a major department of government, could not operate efficiently without an administrative head. Someone must run the show on the administrative side. Someone must be boss. A business concern could not be imagined in which everyone is manager and no one can tell anyone what to do. The system under which everyone is chief and there are no Indians—the direct consequence of the supposed sanctity of the autonomous court—was cast into oblivion forever. In New Jersey a prospective judicial nominee's talent and capacity for executive responsibility, as well as his learning and capacity for adjudication of important questions of substantive law, have now become significant considerations. That was made pre-eminently so in the case of the office of Chief Justice, but I shall later demonstrate that that essential differs only in matter of degree as regards judges of the Superior Court from among whom the presiding judges of the several counties, called

the assignment judges, are selected. In consequence, first among all the states, New Jersey provides a setting in which the administrative judge—the judge with executive capacity to run a business as large or larger than many of our industrial and commercial giants—has come to be respected as much for his accomplishments in bettering justice through administration as he is for his judicial accomplishments in the field of substantive law.

So it is that realization of the goals for the new system depended directly upon the capacity for administration of the first judges into whose hands this great responsibility was entrusted. There was no modern precedent for this job. Procedures for administration had to be worked up from scratch, and were, through an agonizing period of trial and error, before there were forged the smooth running, effective and efficient processes which have accomplished the gratifying results that make New Jersey the envy of the nation and have spread the fame of its system throughout the world. It was the state's immense good fortune to number among its lawyers one who had spared from successful careers as lawyer, law teacher and political leader time enough in generous measure to think upon judicial administration and to be willing, when offered the opportunity, to take on the arduous task of launching the new system. I take not one whit of the credit due to the convention delegates and to the great number of judges, practicing lawyers and others who contributed so much when I say that the leadership of Arthur T. Vanderbilt sparked the fuse that started the system toward the goal, and kept it on the track with unceasing, single-minded, persistent and undeviating devotion when there was danger of straying. His contributions have made his name known everywhere in and out of America where the effort is to better the doing of justice through improved court administration. Honorary degrees and awards from colleges and bar associations too numerous to name have acknowledged his contributions, and we of New Jersey who have been the direct beneficiaries of his labors are the first to acknowledge that these honors have indeed been richly deserved.

## Better Justice . . . *The Administrative Tools*

But the real emphasis of my theme today is upon the administrative tools which were devised to capitalize upon the potential for better justice through improved administration which was the great objective of the new system. There are five features I want to talk about. They are not the only ones, of course, but the five I think particularly significant. Two of them, the Office of the Administrative Director of the Courts and the assignment power of the Chief Justice were provided in the Judicial Article. The remaining three, the adaptation of the Federal Rules of Civil and Criminal Procedure, the broad discovery and mandatory pretrial conference procedures, and the judges' weekly reports, were provided for by the Supreme Court upon the recommendation of the Chief Justice. The Chief Justice will be the first to say that the development of some of these techniques owes as much or more to the actual working out of them by others as it does to him. Literally scores of judges and lawyers joined hearts and hands in the perfection of several of these and other administrative measures. Only the limitations of space prevent my detailing for you the hard work upon the part of so many that went into the fashioning of these tools to their present high state of efficiency. Usually each of these efforts had the guidance of a committee of judges and lawyers under the chairmanship of an associate justice of the Supreme Court. The Committee on Revision and Amendment of the Rules on Practice and Procedure, for example, a particularly important and arduous assignment, has had the benefit of the leadership of Mr. Justice Burling. Similarly as to the Committee on Probate chairmanned by Mr. Justice Heher; the Committee on Court Reporters under Mr. Justice Oliphant; the Committee on Criminal Procedures headed by Mr. Justice Wachenfeld, and the Committee on Evidence under Mr. Justice Jacobs. The great judge whom it was my honor to succeed on the court, Mr. Justice Ackerson, was the first chairman of the Committee on Pretrial Conference and Calendar Control, followed by me during my tenure, and currently an added duty taken on by the Chief Justice. And I could add much more if space allowed, but I must discuss the five features which I think did most to bring us to our present success and which, I strongly feel, must continue to highlight our procedures if we are not to risk marring that record.

## The Federal Rules . . . *A Wise Adaptation*

The first, the adaptation of the Federal Rules of Civil and Criminal Procedure to govern the processing of individual pieces of litigation requires no particular emphasis. It is enough to say that the wise and sensible thing was done in this connection. The Federal Rules represented the most comprehensive, the most flexible, the most modern existing set of rules to accomplish the objective of ruling the disposition of particular cases according to the merits and to prevent their disposition for mere procedural reasons. Those rules represented years and years of work of outstanding experts and reflected the thoughtful criticisms of thousands of individual lawyers throughout the country. They were ours for the asking and it was natural that we should have taken advantage of our opportunity. I do not mean that the Federal Rules were imposed on our system. Long detailed study of each rule preceded the adoption of any, and numerous revisions were made where needed to meet our state situations. That was an intense effort of the ten months intervening between the referendum at which the new Constitution was adopted and the effective date of the Judicial Article on September 15, 1948. One of the major revisions was to make pretrial conference procedure man-

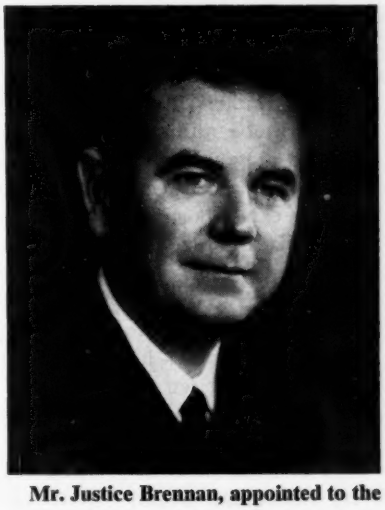
datory. That procedure is voluntary in the federal courts, but our success with the mandatory requirement has occasioned strong support for the same change in the federal system. Chief Justice Vanderbilt summed up our effort as to these rules in his address to the first Judicial Conference in September, 1948, when he said:

> In a very real sense, the new rules are therefore the result of a greater degree of cooperation than are any other rules heretofore adopted in this country. The aim has been directness, simplicity and flexibility in the highest degree consistent with the full preservation of individual rights. We have aimed to maintain the intellectual environment of sound learning which has characterized the decisions of our courts but at the same time to prune away outmoded technicalities and to set up a businesslike administration for the entire judicial system.

The second of the five features I have in mind is the work of the Office of the Administrative Director of the Courts. That work bears directly, of course, upon administration as such, a statement also true of the third, fourth and fifth features. Obviously one cannot administer something without knowing what his problems are. The primary function of the Office of the Administrative Director is to gather and interpret statistics concerning the stuff of court business, which, of course, is litigation. How many cases are there—where are they pending—how long have they been pending—is the number of new cases on the up or down grade—the necessity for such information is apparent. This is not all that the Administrative Director does. He has important housekeeping tasks, budget responsibilities and the duty continuously to study operations and develop procedures the better and more efficiently to process court business. But his function of gathering statistics is what touches particularly upon administration because upon the efficiency and thoroughness with which that job is done depend decisions by the Chief Justice where to assign judges; in what counties temporary measures may be necessary to keep the flow of cases moving, for example, extending the court day or court week until the list is over the hump; whether to recommend legislative remedies—the legislation for transfer of cases from the Superior and County Courts to the District Court is an example. For these vital decisions the Director's statistics must be "live", current data, not dead records of past performances and failures. He does, of course, compile historical data—comparative annual records of the business done in each court. These are serviceable to show trends in litigation and to test the quality and effectiveness of court administration from year to year. His quarterly and annual reports also contain tables showing the work done by the individual judges, information which tells the public the number of hours each judge spends on the bench—although that's not the whole story because many, if not most, judges also spend many long hours in judicial work after the court day.

## The Weekly Report. . . *Minimizing Complaints*

The source of the information in these tables has a special important function and constitutes the third of the five features I want to mention. Each of the judges of New Jersey's trial courts files a weekly report of his activities with the Administrative Director. That report shows his hours on the bench each day, the names of the causes handled during the court day and the time given to each. I suppose one of the complaints most often heard from litigants and the public before the new system became effective was that too often the judge was not to be found on the bench during working hours. The public was not always satisfied with the answer that he was working in chambers. Though the suspicion was not justified, people felt uneasy about the conduct of public business in chambers. Even litigants who remained outside while their lawyers met in chambers with the judge were not completely happy about the practice. It was partly to remove any basis for misunderstanding upon the part of the public and litigants that the



**Mr. Justice Brennan, appointed to the nation's highest tribunal last fall by President Eisenhower, was a member of the Supreme Court of New Jersey for four years. His judicial career began in 1949 when he became a member of the Superior Court. He practiced in Newark for eighteen years prior to ascending the Bench, except for service as a colonel in the Army during World War II.**

Chief Justice proposed and the Supreme Court adopted administrative rules which prescribed fixed court hours and court days throughout the state and forbade the conduct of judicial business in chambers, and finally provided for the filing of a weekly report by each judge. Judges too are human. Some judges are more effective in their work than others, some give more satisfaction to the Bar and the public than others, some are more diligent, more conscientious, more devoted to their work than others. These individual differences cannot be changed administratively, but there should and can be equality in the number of hours each judge of the same court spends in the courtroom. And it is not enough that matters are in fact decided upon the merits and only upon the merits; it is equally important that the *appearance* of that fact be evidenced for all to see. Conferences in chambers between judge and lawyers or litigants too often are misunderstood by lay observers and wild rumor and conjecture present the hazard of undermining

confidence in the judicial process. This weekly report operates to assure both that inequalities in the burden of judicial work among the judges will be minimized and that what the judges do will be done in the open for all to see.

The weekly report is designed also to minimize another reason for complaint under New Jersey's former system. I refer to delays by judges in decisions upon matters to be decided by them and not by a jury. Delays as much as eight or ten years were not unknown. Now each judge must list on his weekly report every reserved decision and list it again on every subsequent weekly report until the matter is decided. If the Office of the Administrative Director notes that the decision is reserved an undue length of time, an inquiry of the judge for a reason usually has the consequence of a prompt disposition thereafter. This device has made a valuable contribution toward the goal of minimizing delays in this large area of judicial determinations.

The fourth of the five features is pretrial discovery and mandatory pretrial conference procedure. This is a feature upon which I freely confess to having what is perhaps an arbitrary prejudice. I am so fully convinced that these tools accomplish better justice, not only in bringing about settlements and avoiding time-wasting trials, but of far more importance, in assuring that right and justice shall have the most favorable opportunity of prevailing in cases that are tried, that I have almost a closed mind to any argument opposing the mandatory requirement. I cannot be far wrong either in the light of the evidence that this will shortly be the requirement in more jurisdictions. I mentioned what is happening in the federal courts. I note also that California has made the requirement of pretrial mandatory. There is a definite trend in that direction and New Jersey is responsible for it. And the trend was inevitable. If, in the lay mind, the law's delays contribute to unfairness of result, the public has equal reason to complain of the fact that all too often a trial becomes a battle between opposing counsel rather than an orderly, rational search for the truth in the merits of the controversy. It used to be in New Jersey, too, that neither side of a lawsuit ever knew until the actual day of trial what the other side would spring in the way of witnesses or facts. The technique was to play the cards close to the vest and hope by surprise or maneuver at the trial to confound one's adversary or, more important, to confuse the jury sufficiently to carry the day whether or not right and justice lay on the side of one's client. It was and is great sport, but hardly defensible as a system for determining causes according to truth and right. In pretrial procedure, made effective through a precedent broad discovery practice, lies the best answer yet devised for destroying surprise and maneuver as twin allies of the sporting theory of justice.

## Pretrial Procedures . . . *Getting the Facts*

Pretrial discovery and pretrial conference procedures are the means for tearing aside the curtain. They permit each party long before trial to probe virtually without limit into the case of the other side, and so to learn everything about his own and the other side's strengths and weaknesses. Each lawyer obtains the names of the other's witnesses and may examine those witnesses fully at his own office. When each side can see in this manner the whole case exposed to view before the day of decision, each is obviously in the best possible position to evaluate his chances of success, or lack of them. The whole process is concluded at the pretrial conference between the judge and the lawyers, usually without the clients present. It is at that conference that the case is synthesized in a tailor-made document suited only for the particular cause to which it relates. In that document, the pretrial order, appear not merely the matters upon which the parties can agree, thus avoiding waste of time in their proof at the trial, and not merely a delineation of the legal issues, simple or complicated, but, far more important, that which gives the case its individuality, that which makes it as unlike any other case as my fingerprints are unlike yours, for in it appears the revelation of the factual controversy and contentions as to the facts on both sides. It is the facts that created the controversy in the first place. There would never have been a lawsuit but for the parties' disagreement on the facts of the incident or event or transaction which gave rise to the action.

Pretrial discovery and pretrial conference procedures can truly be employed as a scalpel to lay bare the true factual controversy, and therein lies the basic worth of these procedures. They help attain the ideal of dispositions according to right and justice. They perform a great service in helping to eliminate or avoid calendar congestion. That service lies in the impetus they produce toward voluntary settlement, a service of such proportions in New Jersey that now only a little more than one out of every four or five cases ever gets to trial. The best we did in the old days was to settle half the cases; the other half were tried. Their contribution is not to be measured by the number of cases settled at the pretrial conference itself. Some are settled then, but New Jersey has stood steadfastly against the perversion of the pretrial procedure into a device for forcing settlements. Lawyers of other states complain with some bitterness that this is the only value that some judges attach to these pretrial devices. But where, as should be the case always, the overriding primary function of the pretrial conference is to further the disposition of the case according to right and justice on the merits, the contribution to a settlement can never be the reason for the conference, but merely an incidental, although, of course, valuable result of it. The reason that the contribution toward settlements has been so great is simply that the procedures of necessity create an atmosphere conducive to voluntary settlements. Each side knows the strengths and weaknesses of his own and his adversary's case, and, given

# Lawyers and Their Clients:

# Contributions to Higher Education

by **Thomas J. Cunningham** · ***General Counsel of the University of California***

**In these days of rising costs and expanding student bodies, our privately endowed institutions of higher education are faced with the tremendous burden of keeping ahead financially. Mr. Cunningham points out that lawyers and their clients can help our colleges and universities and at the same time solve some of the client's tax problems. Contributions to colleges and universities are of course deductible. In the following article, the author discusses a number of forms such gifts may take and he shows how such gifts can reduce taxes—and sometimes even result in a profit for the taxpayer.**

Ever since Harvard College was established in 1636, with a gift of £779 and a library of two hundred and sixty books from John Harvard, American colleges and universities have depended upon the generous support of private individuals. Even our publicly supported institutions have looked to private gifts for the additional resources needed but unobtainable from public funds.[1]

Representatives of industry, education, philanthropy and government all have spoken out with concern about the multiple and acute problems facing higher education in the coming decades.[2]

Earlier this year President Eisenhower, in his Message to Congress on Educational Needs, declared:[3]

> We have already reached an all-time peak in enrollment in colleges and universities. Yet, in the next ten to fifteen years, the number of young people seeking higher education will double, perhaps even triple.

Increasing enrollments, however, by no means represent the whole problem. Advances in science and technology, the urgency and difficulty of our quest for stable world peace, the increasing complexity of social problems —all these factors compound our educational needs.

One fact is clear. For the states, localities and public and private educational institutions to provide the teachers and buildings and equipment needed from kindergarten to college, to provide the quality and diversity of training needed for all our young people, will require of them in the next decade the greatest expansion of educational opportunity in our history. It is a challenge they must meet.

As one who has recently returned to university life, I have been amazed to learn of the size and scope of the financial problems posed, in substantial measure, by the ever-increasing enrollments in institutions of higher learning. During my own undergraduate days in the late twenties, there were about one million students in attendance in colleges and universities throughout the country. Today there are three million,[4] and estimates for 1970 range from approximately four and one fourth million to six and one half million students.[5] Patently, this growth creates tremendous problems in terms of costs. The total current operating expenditures for higher education today exceed two and one half billion dollars per annum,[6] and by 1970 will be at least five billion dollars a year.[7] Within twenty years the outlay for new physical facilities will exceed ten billion dollars.[8]

1. For example, approximately one half of the cost of the lands and buildings of the University of California during its first seventy years came from private gifts. Office of the President, OPPORTUNITIES FOR PUBLIC SERVICE THROUGH GIFTS AND BEQUESTS TO THE UNIVERSITY OF CALIFORNIA (rev. ed. 1955). At the University of Michigan more than one half of its plant and equipment was obtained from sources other than state appropriations. University of Michigan Development Council, . . . EDUCATION SHALL FOREVER BE ENCOURAGED 5.

2. The following are a sample of recent provocative articles on this subject: American Academy of Political and Social Science, *Higher Education Under Stress*, 301 ANNALS (September, 1955); Drucker, *Will the Colleges Blow Their Tops?* 213 HARPERS 20, 63-8 (July, 1956); Haverstick, *After High School: The Next Crisis*, 39 SATURDAY REVIEW 21-3 (September 8, 1956); Prentis, H. W., *New Goals for Business*, 39 SATURDAY REVIEW 14 (January 19, 1957); Rickover, H. G., *Let's Stop Wasting Our Greatest Resource*, SATURDAY EVENING POST (March 2, 1957); Smith, *The Banker's Part in the Rise of Business Aid to Education*, BANKING (June, 1955).

3. NEW YORK TIMES, January 29, 1957, page 16.

4. NEW YORK TIMES, January 15, 1956, page 56.

5. American Association of Collegiate Registrars and Admission Officers, THE IMPENDING TIDAL WAVE OF STUDENTS (1955).

6. Office of Education, STATISTICS OF HIGHER EDUCATION: RECEIPTS, EXPENDITURES AND PROPERTY, 1951-52, Chapter IV, §2.

7. American Academy of Political and Social Science, *op. cit. supra* note 2, at 145.

8. *Ibid.*

Any reduction in the effort to make a higher education available to all those in the younger generations who want it and are qualified would be an unwise economy. Such a move would appear to be contrary to one of the basic tenets of the American philosophy and in the light of the current international picture would seem to be short-sighted. Roy E. Larsen, President of Time, Inc., recently stated:[9]

> America's children are America's future. This is not the time to change our minds about universal education. This is the time to reaffirm that commitment.

A lowering of standards of higher education cannot work to the long-run advantage of the country. Preservation of our system of private colleges and universities is essential to the welfare of the nation. The independence of thought and action which the private institutions engender, through their competitive influence on publicly controlled institutions, will continue to have a beneficent effect upon the growth and development of our society.

If America's higher education is to maintain its standards of high quality in the face of the approaching multitude of students and staggering costs, the responsibility must be shouldered, not only by public bodies, but in increasing measure by private individuals and corporations.[10]

Corporate benefactions have been greatly stimulated in the last few years. John D. Millett, President of Miami [Ohio] University, recently stated that private corporations have upped their contributions in this cause from about forty million dollars in 1950 to approximately one hundred million in 1955.[11] Authority for the legal propriety of such giving on a more liberal basis is beginning to appear.[12]

But no longer is philanthropy the prerogative of the few—today it is the privilege and obligation of the many.

Naturally a person's first concern is the financial security of his family and loved ones. When those responsibilities are satisfied or no longer exist, there is no finer disposition of one's estate than a gift to education.

The public at large is generally familiar with the fact that there are income, gift and death tax advantages incident to charitable transfers. However, knowledge of the great variety of ways in which these revenue law deductions and exemptions may be employed is not widely publicized. The net cost of educational giving can be very low, and in certain instances, redound to the benefit of the donor and those closest to him.

It seems to me that the Bar of the nation is particularly well situated to come to the aid of higher education. Lawyers can perform a real service, not only to our nation's colleges and universities, but to their clients as well, by suggesting appropriate tax savings through gifts to institutions of higher learning. Clients appreciate being informed of tax savings, and such savings are encouraged by federal[13] and state governments.

In substantial measure, the modern American attorney owes his profession to our system of higher education; of necessity, he recognizes its value. He possesses the means with which to translate the needs of society into constructive action. His opportunity to lead his fellow citizens toward sound solutions of this basic problem is pre-eminent.

Information as to particular requirements of a recipient institution is readily available. Every such institution with which I am familiar has in its service at least one person specially qualified to inform donors of its status, programs, requirements and specific needs. There are others, wholly independent of the educational field, who have prepared themselves to present the relevant facts on an impartial and business-like basis.[14] In co-operation with them, the lawyer can evolve a plan of action best suited to the interests of his client, higher education and society.

This article is designed to summarize briefly some of the techniques that a lawyer might consider in order to minimize the cost to the donor and likewise accomplish the greatest benefit for education. It is not designed as a technical tax treatment of the subject,[15] and it is presumed that lawyers will consult with tax experts where necessary. The following techniques of giving are examples which have crossed my desk within the past year:

## Cash Gifts

The least complex method of making a contribution to an educational institution is by a cash gift. To obtain the maximum advantage the donor should stay within the

9. Larsen, *The Crisis in Education*, 101 J. ACCOUNTANCY 33 (January, 1956).

10. The American Association of Fund Raising Counsel placed giving to higher education at $507,000,000 in 1954-55 aside from the Ford Foundation grants. NEW YORK TIMES, January 3, 1956, page 32. However it has recently been estimated that the nation's colleges and universities will need $800,000,000 more a year during the next decade. NEW YORK TIMES, March 15, 1956, page 13.

11. Millett, *Recent Developments in Financing Higher Education*, 301 ANNALS (September, 1955) page 205. According to the latest statistics from the Internal Revenue Service corporations gave 1.24% of their net taxable income to philanthrophy and about one fifth of this amount went to higher education. NEW YORK TIMES, January 13, 1957 (page 78).

12. See, for example, *A. P. Smith Manufacturing Co.* v. *Barlow*, 13 N. J. 145, 98 A. 2d 581 (1953), *cert. denied* 346 U. S. 861 (1953).

13. Section 170 of the Internal Revenue Code of 1954 increased the maximum allowable income tax deduction for charitable gifts of most donors from a previous 20 per cent to 30 per cent of adjusted gross income. (See Int. Rev. Code of 1954, §62, defining adjusted gross income). The additional 10 per cent is allowed by Section 170(b)(1)(A) when contributions are given to (a) a church or a convention or association of churches; (b) an educational organization referred to in Section 503(b)(2) of the Int. Rev. Code of 1954, or (c) a hospital referred to in Section 503(b)(5) of the Int. Rev. Code of 1954.

The purpose of this increase was "to aid these institutions in obtaining the additional funds they need, in view of their rising costs and the relatively low rate of return they are receiving on endowment funds." (H. R. Rep. No. 1337, 83d Cong., 2d Sess. 25 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 207 (1954)).

Donors should be cautioned that to obtain the additional 10 per cent their contributions must be made directly to the enumerated charitable organizations and not merely for the use of those institutions. (Paragraph 4 of T. D. 6118, 1955 Int. Rev. Bull. No. 3 at 106).

14. The philanthropic advisory service offered by The Hanover Bank in New York is a noteworthy example here. The Council for Financial Aid to Education offers a wide range of publications on methods and plans of corporate giving.

15. A number of technical articles have appeared on this subject: Kuhns, *Tax Implications of Charitable Contributions by Corporations*, 2 J. TAXATION 258-61 (1955); Rea, *Changes in the Internal Revenue Code of 1954 Affecting Charitable Organizations*, 27 ROCKY MTN. L. REV. 270-305 (1955); Mallory, *Charitable Gifts in Estate Planning*, 94 TRUSTS & ESTATES 434, 435-36 (1955). Perhaps the best article is Cohen, *Means and Methods of Making Charitable Contributions Under the Internal Revenue Code of 1954*, 3 ST. LOUIS U. L. J. 117 (1954).

30 per cent statutory limitation of adjusted gross income.[16] The gift saves the tax on income equal to the value of the gift. The higher the income, the greater is the tax saving. In encouraging charitable contributions, the Federal Government absorbs a part of the cost of every gift to education.

To illustrate, let us assume that Mr. *A*, an unmarried donor with a net taxable income of $25,000,[17] wishes to make a gift of $7,500 to a college. Ordinarily without the charitable deduction he would pay a federal income tax of $9,796 on his earnings. However, with it he reduces his income tax to $5,650. Therefore, the actual net cost to the donor of his $7,500 gift is only $3,354.

## Life Income Plans

Under a life income plan, an institution agrees to pay to the benefactor or his nominee for life the income derived from such investment. Most American colleges entertain such plans although some place restrictions on the terms of the agreement. Among the advantages to the donor are a competent investment service; a present income tax deduction in an amount equal to the commuted value of the remainder where the transfer is made irrevocably, subject to the percentage limitations of the revenue laws;[18] and commonly, complete avoidance of gift or death taxes on the transfer of the remainder.[19]

The income tax deduction may be illustrated in this manner: Assume that Mr. *B*, aged fifty, makes an irrevocable gift of $10,000 to a university, reserving unto himself for life the income derived from such investment. For federal income tax purposes, he may deduct in the year of the gift the better than $4,800 value of the remainder interest, to the extent that that sum plus the amount of his other charitable contributions does not exceed the statutory limitations.[20] If it is anticipated that such transfers will exceed the percentage limitations, the gift may be spread over two or more years to take advantage of this income tax deduction more fully. If income is also reserved for another, then gift or death taxes may be imposed.[21]

## Life Annuity Plans

A few colleges, qualifying under local law as insurance carriers, have embarked on programs of issuing actual life annuity contracts in exchange for contributions.[22] These contracts do afford security of income. More than that, insofar as the value of the gift exceeds the charge made by the typical commercial carrier for a policy producing like benefits, it is deductible as a charitable contribution, again limited by the 20 per cent–30 per cent rules.[23] Further, a portion of the annual return is income tax free under the life expectancy annuity rule.[24]

## Appreciated or Depreciated Property

If the prospective donor proposes to make a gift to higher education of property, other than inventoriable items or assets held for ordinary business sale, the current market value of which is greater than its cost or other basis to him, it will be to his income tax advantage to make the transfer in kind. For such tax purposes, he can deduct the full present value of the donation, subject to the statutory limitations.[25] Further, he is not chargeable with the capital gain.[26]

For example, Mr. *C*, a donor who has a net taxable income of $25,000,[27] has securities worth $7,500 which he obtained for $2,500 over six months before. If he sells the securities, he would realize a long-term capital gain of $5,000 on which there would be a $1,250 tax. Mr. *C* has an actual net value in the securities of $7,500 minus $1,250, or $6,250. If he gives the $6,250 to a college, deducting that amount, his income tax would be reduced by $3,516.50 Thus the college would receive a $6,250 gift at an actual cost to the donor of $2,733.50. However, if Mr. *C* gives to a college the securities valued at $7,500, he would not have to pay a capital gains tax and could deduct the $7,500 as a charitable deduction. Such a deduction would reduce Mr. *C's* income tax by $4,146. That amount plus the avoidance of the $1,250 capital gains tax would reduce the actual cost of the gift of $7,500 to $2,104. Yet the

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16. Int. Rev. Code of 1954, §170. If the donor makes his gift by check, a charitable contribution is deductible at the time the check is delivered, provided it is honored and paid and the gift is not subject to conditions. Rev. Rul. 54-465, 1954 Int. Rev. Bull. No. 2 at 3; *Estate of Modie J. Spiegel*, 12 T. C. 524 (1949), *acq.* 1949-2 Cum. Bull. 3.

17. After all deductions except deductions for charitable contributions and before deduction of the personal exemption.

18. Int. Rev. Code of 1954, §170; Rev. Rul. 55-620, 1955 Int. Rev. Bull. No. 42 at 9; Rev. Rul. 55-275, 1955 Int. Rev. Bull. No. 19 at 18.

19. Int. Rev. Code of 1954, §§2055, 2522. But note that not all state revenue laws allow a deduction or exemption for transfers to educational institutions located beyond the jurisdiction.

20. U. S. Treas. Reg. 108, §86.19 (f) (1).

21. Rev. Rul. 55-275, 1955 Int. Rev. Bull. No. 19 at 18; (I.T. 3707, 1945 Cum. Bull. 114; Rev. Rul. 55-620, 1955 Int. Rev. Bull. No. 42 at 9); U. S. Treas. Reg. 108, §86.19.

22. In a recent informal survey conducted among forty-four universities and colleges, ten reported issuing such annuities.

23. Mallory, *op. cit. supra* note 15 at 435-36; *Cf.* Rev. Rul. 55-388, 1955 Int. Rev. Bull. No. 25 at 14.

24. Int. Rev. Code of 1954, §72(b).

25. J. T. Fargason, 21 B.T.A. 1032 (1930); L.O. 1118, II-2 Cum. Bull. 148 (1923); U. S. Treas. Reg. 108, §86.19(a).

26. 2 CCH 1956 Stand. Fed. Tax Rep. ¶1864.325.

27. See note 17 *supra*.

college is benefited by the full $7,500.

In cases where a donor is in a higher tax bracket he may even realize a profit from a gift to education of appreciated property. Assume that Mr. *D*, a donor who is single, has a net taxable income of $180,000. He owns securities costing $10,000 now valued at $60,000. If he sold the securities and made no gift, he would have total cash receipts of $240,000. His total taxes would be $150,780, and the cash retained by him would be $89,220. However, if Mr. *D* gives the securities valued at $60,000 to a university, his cash receipts would be only $180,000, but his tax liability would be reduced to $84,586 and the cash retained by him would be $95,414. Therefore, Mr. *D* by making the gift to education actually realizes a profit of $6,194.

Conversely, if the asset has depreciated in value and if it is of a kind on which he may legitimately claim a tax loss, it will, of course, pay him to sell it and turn over the proceeds to the college.[28]

To illustrate, Mr. *E* has securities worth $2,500 that more than six months ago cost him $7,500. If he donates the securities, he receives a maximum charitable deduction of $2,500. If he sells the securities and then makes a cash gift, he can have a charitable deduction of $2,500 as well as the long-term capital loss of $5,000.

## Short-Term Educational Trusts

This medium can be of particular value to those presently in high income tax brackets. Thereunder, the benefactor irrevocably conveys assets in trust for a term of at least two years with instructions to pay over the income to a single college or university and on expiration of the prescribed period to return the principal to himself or his estate. Top-tax bracket income of small net worth to the donor is thereby temporarily released to education; at the same time, the underlying assets are preserved for the use of the grantor in retirement or other times during which he anticipates the receipt of a lesser income. The income of the trust is not taxable to the trustor under this statutory exception to the Clifford Rule.[29] The 20 per cent—30 per cent limitations on charitable donations would seem to be inapplicable in this instance, for during the term of the trust its income does not constitute part of that of the trustor.

## Life Insurance

Another mutually advantageous way of effecting gifts to education is through life insurance, either existing or new.[30] Potentially it is an inexpensive means of transferring substantial sums. Gift and death taxes and the expenses of administration are avoided.[31] Premiums paid, within the statutory limitations, are deductible for income tax purposes, if the educational beneficiary of the policy is irrevocably named and if all incidents of ownership and rights thereunder are likewise assigned.[32]

Let us assume Mr. *F* at age forty-five buys a straight life insurance policy at an annual premium of $37.50 per thousand, designating a college as beneficiary irrevocably. The entire premium paid on the policy is deductible each year for federal income tax purposes, within the 20 per cent—30 per cent limitation of adjusted gross income. For an individual in the fifty per cent tax bracket, a $10,000 policy, costing $375 per year, actually only costs the donor less than $200.

Another way in which new insurance might be obtained is through purchase of a twenty-pay-life policy rather than a straight life policy. The annual premium is slightly in excess of $100 more than the straight life premium. If Mr. *F* pays all the premiums at one time in order to take advantage of the discount for premiums paid in advance, the total payment would be roughly $8,000. If he were in the 50 per cent tax bracket, his actual cost would be less than $4,000. However, the college at the donor's death would receive the $10,000 as well as any premiums paid in advance but not used prior to death plus dividends. Thus the donor has been able to make a gift to the college of at least $10,000 at a cost to him of less than $4,000.

## Assets of Uncertain Value

There are circumstances where the very difficulty of placing a value on some classes of assets makes their selection worthwhile subjects of transfers to educational institutions. This point can perhaps best be made through illustrations.

Let us assume that Mr. *G* calls upon you. He is a widower of some fifty-eight years. He desires to turn over the ownership and control of all of the stock of *Y* Corporation, which is held in his own name, to his two adult children. Neither child is presently dependent upon him. He also wishes to give something to his alma mater, *Z* University. He tells you that he has heretofore exhausted his lifetime specific exemption from federal gift taxation. He further advises you that the company has issued 10,000 shares and he estimates the present unit value thereof to be $4. Finally, he indicates that his adjusted gross income for the year will be about $25,000 and that his non-business deduction for other than charitable contributions, of which he has made none to date, amounts to about $2,000.

Under these assumed facts, it is possible through the employment of the income tax deduction for gifts to education, to hedge against the vagaries of the valuation process. It works this way: If Mr. *G* gives 1,000 shares of *Y* Corporation stock to each of his two children and to *Z* University, and if his estimates as to income, deductions and values prove correct, then his federal gift tax liability for the gifts to his children will amount to $67.50 in all and his federal income tax will be $6,412.

But suppose that the Treasury Department asserts that the unit value

*(Continued on page 573)*

28. 2 CCH Stand. Fed. Tax Rep. ¶1864.325.
29. Int. Rev. Code of 1954 §673(b); 3 CCH 1956 Stand. Fed. Tax Rep. ¶3716.20.
30. An excellent discussion of this subject may be found in Cohen, *op. cit. supra* note 15.
31. Int. Rev. Code of 1954. §§2042, 2522.
32. Ernst R. Behrend, 23 B.T.A. 1037 (1931), *acq.*, X-2 Cum. Bull. 5; *Eppa Hunton IV*, 1 T. C. 821 (1943), *acq.*, 1943 Cum. Bull. 12.

# The Legal Profession in England:

# Its Organization, History and Problems

by **W. W. Boulton** · ***Secretary of the General Council of the Bar of England and Wales***

**In this article, Mr. Boulton describes the organization, the history and the problems of the Bar in England and Wales. The English Bar is highly organized, and its organization resembles that of the integrated Bars in many of our states. This is a paper submitted to the Sixth Conference of the International Bar Association held in Oslo, Norway, July 23 to 27, 1956.**

The legal profession in England is and for centuries has been divided into two branches. This division is more complete and clearly defined today than at any time in the past. Legal practitioners consist of barristers on the one hand and solicitors on the other. This paper is concerned with barristers and their professional organization in England.

Barristers are specialists in advocacy and have exclusive right of audience in the Supreme Court. They share the right of audience with solicitors at County Courts and Magistrates Courts at which the less important (but a great proportion) of the civil and criminal work of the country is conducted. In addition to court work barristers draft the pleadings in High Court cases and advise on the prospects of success in regard to proposed litigation.

Barristers are not permitted to act for a client except on the receipt of instructions from a solicitor. The lay client, therefore, has to go to a solicitor in the first instance.

Barristers may not, unlike solicitors, enter into partnerships. But it is usual for them to share offices, or chambers as they are called, and the services of a clerk. All negotation as to fees is done between the clerk and the solicitor or his clerk.

A barrister has to accept any work he may be offered in the courts in which he holds himself out to practice; and he must charge a separate fee for each piece of work he does. He cannot work for one client only or for an annual salary.

A practicing barrister may not in general have any other profession or occupation.

Under no circumstances may a barrister advertise or tout for work.

## The Beginnings of the Bar . . . *In Norman Times*

In Norman times (eleventh-thirteenth centuries) it was quite common for a party to have assistance in the conduct of his case, but this was given by a friend, not by a professional expert. The main function of this friend was to recite the formal words necessary in the making of a claim or defense, and the reason for persuading him to do it was that if he (the friend) made a mistake the party could disown it with impunity, whereas if he were to make an error himself, it would be fatal to his case. By the thirteenth century, however, the common law of the country and the procedure as developed by the courts which enforced it, had become so complicated that a need for more expert assistance arose. As a consequence the friend of the party came to be replaced by a professional pleader or "narrator" who not only conducted the oral pleadings but argued questions of law on behalf of his client, and it is from the "narrator" that the barrister of present times is descended.

In the reign of King Edward I (1272-1307) a second class of professional lawyer emerged, called an attorney, to whom the modern solicitor owes his origin. The attorney was not a mere assistant in the conduct of litigation, but a person who was competent to act in place of his client as his agent. A need for such a representative arose because some litigants, especially large landowners, found it difficult or inconvenient to attend court and carry through their cases in person. This division of the profession into two different categories of lawyer, though passing through many stages of development and evolution, has remained in England to the present day.

In early times the education of all lawyers was placed in the hands of

the judges who had authority to decide which of them might practice before the courts.

Gradually we find a picture emerging of groups of junior practitioners and students (apprentices) gathered in the house of some great lawyer or judge under whom they studied. These groups in the course of time formed themselves into permanent societies, each with its Inn or premises where its members lived a more or less communal life. Of these Inns of which there were at one time quite a number, only four survive today as communities of lawyers—Lincoln's Inn, Inner Temple, Middle Temple, and Gray's Inn. They have changed little in their organization during the 600 years or more since they were formed. In effect the Inns were residential colleges, similar to a university, for the study of the common law; but in addition to law, tuition was given in other subjects also such as music, history and dancing, and it was customary for the sons of wealthy families to be sent there for a polite and useful education even though they did not intend to practice law.

The Inns comprised (as they do today) three distinct groups of persons. First there was a governing body of senior members called "Benchers" because they acted as judges on the bench at the frequent moots or mock trials which constituted one of the main methods of instructing students. Secondly there were the utter or outer barristers who were sufficiently advanced academically to argue in the moots, and lastly the inner barristers or students who were not allowed to argue at the moots, but had to attend for the purpose of instruction. The significance of the words "utter" and "inner" as applied to these last two classes of barrister, lay in the places (outer or inner ends) on the forms which they had to occupy respectively when moots took place.

The actual word "barrister" was not actually found in use before the fifteenth century. Up to that time we find pleaders and students divided into two categories, serjeants and apprentices. The serjeants who were few in number were primarily the King's own advocates and legal advisers, though they were free to take cases other than on behalf of the Crown, and even against the Crown. Until the time of James I (1603-25) they had precedence in court over other counsel. All judges were selected from their number. The serjeants were selected from amongst the ranks of the apprentices. In some if not all courts they originally had sole right of audience and it is, therefore, possible that at one time the apprentices were no more than students but it is clear that in due course they formed the greater part of the practitioners. No more serjeants were appointed after 1877 and the last of their order died in 1921.

At one time attorneys could be members of the Inns of Court (though it is not clear whether they had to be) and until the end of the seventeenth century could be called to the Bar. They were also permitted by the court to plead their clients' cases in court. By the eighteenth century, however, the clerical and preparatory side of legal work came to be recognized as the proper and principal function of attorneys and at that stage they were no longer admitted to the Inns or called to the Bar.

In the sixteenth century a new rank of barrister appeared, taking precedence after the serjeants and over other barristers. These were the King's Counsel. They came into being as a result of a practice of appointing leading barristers to be counsel to the Crown and to advise and assist the Attorney General and the Solicitor General. It was their duty to give their services to the Crown as and when required. Originally they were paid £40 per annum for this retainer but later, fees according to the work actually done. In the eighteenth century the duty to the Crown became nominal, although it was only comparatively recently (1920) that King's Counsel were relieved of the need to obtain a special license before appearing against the Crown. Queen's Counsel (as they are called during the reign of a Queen) wear silk gowns in court and are commonly referred to as "silks". Other counsel wear stuff gowns and are known as stuff-gownsmen or juniors.

As already explained, the control of legal education passed out of the hands of the judges to the Inns of Court. With it went also control of the power to admit persons to practice before the courts and of the revocation of admission once granted, *i.e.*, power to call to the Bar and to disbar or suspend. These powers are still said to be delegated to the Inns by the judges. This proposition is supported by the fact that a member of an Inn who has been disbarred or suspended is still entitled to appeal to a committee consisting of the Lord Chancellor and the Judges of the Supreme Court.

Whilst the Inns of Court provided from early times an organization of the profession in London, further organizations came into being in the provinces as the result of the Circuit system. It was Henry II (1154-89) who first sent judges out from London to travel round the Kingdom and at Assizes to administer both the civil and criminal law. The country was divided up into different circuits and one or more judges were allotted to each circuit, within which they travelled from town to town. As the judges moved from place to place, the clerk of the court and members of the Bar moved too on horseback or by coach. There was no question as today of barristers travelling back to London between the conclusion of one case and the beginning of the next or between Assizes. The distances were too great and the means of travel too slow. Consequently the members of the Bar on each circuit formed themselves into communities which reproduced some of the features of the life of the Inns of Court in London; and especially the habit of dining together at night after the court had risen. These communities or circuit bar messes as they were (and are) called, although possessing none of

the disciplinary powers of the Inns of Court in London, nevertheless maintained a strict standard of professional behavior amongst their members if by nothing more than the moral force of collective opinion.

Compared with the Inns of Court and the circuits, the General Council of the Bar is a completely modern institution. It came into being in 1895, as the successor of the Bar Committee which first appeared twelve years earlier in 1883. The need had evidently begun to be felt by that time for a single body which could speak for the Bar with one voice and act promptly on its behalf in an era where corporate representation was becoming increasingly important. The four Inns were still performing all the functions they had performed for several centuries, but in spite of machinery for maintaining liaison between them, they were not collectively organized to act with speed and unanimity in regard to the increasing number of matters both internal and external which were requiring the attention of the profession. The functions which devolved upon the Bar Committee and the General Council of the Bar had to some extent been previously undertaken by the Attorney General who had for long been recognised (as he still is today) as the head of the Bar—and particularly the giving of opinions on matters touching upon professional etiquette. But his official duties must have increased very considerably during the nineteenth century and could obviously only leave him limited time for attention to professional matters. In addition there was a growing demand at the Bar for representation through an elected body as had already long been the case with the Solicitors' branch of the profession.

The General Council of the Bar was established as a result of General Meetings of the Bar in 1894 and 1895. The Inns of Court gave their approval and undertook to contribute financial assistance on the understanding that the Council would not claim to exercise any of the jurisdiction, powers or privileges of the Inns.

## The Bar Council . . .
### *Constitution, Organization*

The General Council of the Bar, normally called the Bar Council, is the only single body which represents the Bar of England and Wales. It derives its authority from the Bar acting in general meeting and by virtue of that authority is under a permanent duty to consider all matters affecting the profession and to take such action thereon as it deems expedient.

The Council is for the most part an elected body, forty-eight out of its fifty-eight members being elected members. Of the remaining ten, the Attorney General and Solicitor General are *ex officio* members. There are also eight additional members who are appointed each year by the elected members to represent those sections of the Bar, *e.g.*, Tax, Parliamentary, Patent and Divorce Bars, which are not normally able to obtain representation through the ballot box. Two of the additional members may be non-practicing barristers.

All members of the Bar are entitled to vote at the Annual Election which now takes place in the latter part of July. Ballot papers are sent out by the Secretariat to all practicing members of the Bar and to such others as subscribe to the Council, but any barrister who has not received a ballot paper is entitled to have one on request. Twenty-four members are elected each year to fill vacancies caused by the compulsory retirement of those twenty-four of the forty-eight elected members who have been longest in office. Provided he has not served for more than four years consecutively and has not attained the age of 72, a member of the Council who retires by rotation is eligible for re-election.

Apart from the two additional members who may be non-practicing barristers, all members of the Council must be in practice.

The Officers of the Council—Chairman, Vice Chairman and Treasurer—are elected each year at the first meeting of the Council which takes place after October 1 (the beginning of the legal year). A Chairman may not serve as such for more than four years consecutively and the same applies in practice to the Vice Chairman and Treasurer.

Once a year (now in July) the Council faces the Bar at the Annual General Meeting which is normally held in the medieval surroundings of the Middle Temple Hall. Any member of the Bar is at liberty to put down for discussion at this meeting any resolution he pleases, provided he gives at least twenty-one days' notice of it in writing to the Secretary of the Council. Before these private resolutions are moved and debated, the meeting is addressed by the Attorney General who, as the head of the Bar, presides, and by the Chairman of the Council. It is customary for these addresses to include a review of the principal matters which have been engaging the attention of the Council during the previous twelve months and to touch on the more acute problems facing the profession and the lines along which solutions have been or may be sought. The Chairman concludes his address by moving the adoption of the Annual Report, or Annual Statement as it is called, of the Council covering the Council's activities over the past year. The statement is circulated to the Bar about a month before the Annual General Meeting.

Apart from the Annual General Meeting, the Council can and sometimes does convene Extraordinary General Meetings of the Bar; and an Extraordinary General Meeting can also be requisitioned at any time by not less than forty practicing barristers.

The business of the Council is conducted in the main by its several committees. There are seven standing committees, Executive, Professional Conduct, Law Reform, External Relations, Legal Aid, Court Buildings and Legal Education. There are also two standing joint committees—one with the Inns of Court and the other with the Law Society. In addition the Council has

four members on the Law Society's Legal Aid Committee on which falls the burden of the administration of the Legal Aid and Advice Act 1949.

Special committees are appointed as and when required. A very wide range of business is dealt with by the Executive Committee which meets once a fortnight during term time.

All business is attended to in the first instance by the Secretariat and, wherever necessary, allotted to the appropriate committees. Committees have a wide authority to take decisions on matters referred to them. Otherwise they make recommendations to the full Council.

The Council meets once a month during term time and the agenda consist of reports and recommendations from the various committees.

As regards finance, the Council derives the majority of its income from subscriptions and the remainder from annual contributions by the Inns of Court. Every practicing member of the Bar (there are approximately 2,000), is expected to subscribe a specified amount each year according to his seniority; but the Council has no sanction to enforce the payment of subscriptions and its willingness to give its services to a member of the Bar is not dependent upon his being a current subscriber. A measure of financial support is received also from members of the profession who are not in practice but who wish to keep in touch with the Council's activities.

## The Work of the Council . . . *Ten Objectives*

As already explained it is the function of the Council to consider all matters affecting the profession and to take such action thereon as it deems expedient. More specifically its objects as provided by a revised constitution approved by the Bar in a General Meeting in 1946, are as follows:—

(*a*) The maintenance of the honor and independence of the Bar, and the defense of the Bar in its relations with the judiciary and the executive.

(*b*) The encouragement of legal education and the study of jurisprudence.

(*c*) The improvement of the administration of justice, procedure, the arrangement of business, law reporting, trial by jury, and the circuit system.

(*d*) The establishment and maintenance of a system of prompt and efficient legal advice and aid for those persons in need thereof irrespective of their capacity to pay.

(*e*) The promotion and support of law reform.

(*f*) Questions of professional conduct, discipline and etiquette.

(*g*) The furtherance of good relations and co-operation between the two branches of the legal profession.

(*h*) The furtherance of good relations and understanding between the Bar and the public.

(*i*) The furtherance of good relations between the Bar and lawyers of other countries.

(*j*) The protection of the public right of access to the Courts and of representation by counsel before courts and tribunals.

As will be seen from the earlier paragraph on organization the Council consists, with two possible exceptions, of practicing barristers, and it is in general true to say that it represents primarily the interests of the practicing profession. One of the phenomena of the Bar today is the large proportion of men who are called and then do not proceed to practice or if they do, abandon it within a comparatively short time. This is due largely to economic reasons and especially to the difficulty of young men in finding means to support themselves during the initial years of practice when earnings are negligible. But whatever the reasons the result is that in contrast to the 2,000 barristers who are in practice, there are probably three or four times that number who have entered other occupations—*e.g.*, the Government Service, Colonial Legal Service, Local Government, commerce, and industry. The Council does not attempt to provide any collective form of representation for these barristers. Their activities and interests are so diverse that it would in any event be impossible. But it is prepared to consider requests for support which may be made by any particular section of non-practicing barristers. For example the Council supported members of the Bar in the Government Legal Service some years ago in a claim for higher salaries. But quite apart from the question of support the Council cannot ignore the activities of non-practicing barristers where these threaten to undermine the high standing of the profession or to bring the Bar into conflict with the solicitors' branch of the profession. It follows that the Council has a limited responsibility for those who are qualified but do not practice as barristers and has perforce to lay down from time to time rules for their guidance. It does in fact receive requests for advice from and gives guidance to a substantial number in the course of each year. But subject to these preliminary observations, further references to the Bar and to barristers are directed to the practicing profession.

In the following account of some but by no means all of the Council's current activities, it is perhaps not inappropriate to start with a reference to what many practitioners believe to be the most acute problem of the profession at the present time —the inability to make proper provision for retirement. The barrister, unlike many other professional men and the small shopkeeper or businessman has no assets to turn into capital at the end of his career; no partnership or goodwill to sell. At the same time the incidence of taxation is such that under the existing law adequate saving out of earned income even by the most successful is virtually impossible. Salaried employees are in a much more favorable position in regard to retirement benefits than professional men because they and their employers are relieved of tax on premiums paid towards policies of insurance or superannuation funds, designed to produce an annual income when the age of retirement is reached. The professional man enjoys no similar concessions. The Council has played an active part over the past two years in conjunction with the Law

(*Continued on page 566*)

# The Lawyer's Concern About Taxes:

# We Must End Confiscation by Taxation

by **Charles W. Briggs** • *of the Minnesota Bar (St. Paul)*

**Mr. Briggs is concerned about two problems that are as old as civilization: taxation and inflation. Our present tax structure, he writes, is unsound and dangerous because it is drying up the sources of capital needed for the investments in new enterprises that lead to expanding economy. He urges the legal profession to support a bill, H. R. 6452, sponsored by Representative Sadlac, of Connecticut, which over a five-year period would reduce the present high rates of tax progression to more moderate proportions.**

Systematic efforts to smash capitalism (private capitalism) are no longer to be ignored by the legal profession. Ultimate survival of the profession is involved. Capitalism describes a way of economic and social life which cannot thrive upon apologies for the institutions of private property, economic competition and freedom of enterprise. The legal profession has lived with and upon capitalism in a symbiotic relationship. From capitalism as a host the legal profession has drawn its sustenance and strength, indeed its very life. Reciprocally the profession has formulated and applied the rules and principles for the government of a free enterprise system in which capitalism is able to survive. Once either of the parties to this relationship perishes the other dies also. Those who remain to be called lawyers speedily become the abject minions of the state—their freedom and emoluments gone. It is timely that we point out here the significance to lawyers of the possible demise of capitalism. The miserable condition and subservient position of the Bar in totalitarian countries today is ample justification for concern. With the disappearance of a capitalistic society goes also the legal profession, a necessary and effective force in the defense of individual liberty.

There has been for some time a mounting apprehension of what inordinately high taxes and inflation, the twin despoilers of ancient lineage, may do to our social and economic structure. The lawyers may well constitute an effective core of resistance to the use of these weapons. Lawyers should not be indifferent while in the legislative mold is cast the legal framework of our society and our economy.

Quite often lawyers pursue a narrow and legalistic course in the tax field. They focus their attention upon particular cases while they neglect the public interest and too often ignore the broader economic and social aspects of our over-all tax structure. Is this the sole and inescapable mission of one who tends to the business of clients? We think not. The Bar is honored by distinguished members who have in various fields unselfishly devoted themselves to the triumph of fundamental ideas and concepts in government and law as distinguished from exhibiting primary interest in persons and events. By doing so they have served both their clients and the public well—sometimes perhaps without the reward of soul stirring appreciation of their efforts.

There are many enormities in our taxation systems.

## A Double Wringer . . . *Taxation and Inflation*

History affords ample demonstration of the withering blight of such enormities. Every nation of which we have any record has passed through the double wringer of confiscatory taxation and inflation. We feel tempted to follow Justice Holmes' aphorism: "Continuity with the past is . . . a necessity . . . a page of history is worth a volume of logic." But the area of discussion is necessarily limited.

Let us now throw upon the screen a chart which gives a convincing picture of one enormity—the terrific impact of our federal progressive rate structure:

| Taxable Income Over | Not Over | Pay | Tax Rate in Excess Over First Column |
|---|---|---|---|
| $2,000 | $4,000 | $400 | 22% |
| 4,000 | 6,000 | 840 | 26% |
| 8,000 | 10,000 | 1,960 | 34% |
| 10,000 | 12,000 | 2,640 | 38% |
| 16,000 | 18,000 | 5,200 | 50% |
| 20,000 | 22,000 | 7,260 | 56% |
| 26,000 | 32,000 | 10,740 | 62% |
| 32,000 | 38,000 | 14,460 | 65% |
| 50,000 | 60,000 | 26,820 | 75% |
| 100,000 | 150,000 | 67,320 | 89% |
| 150,000 | 200,000 | 111,820 | 90% |
| 200,000 | | 156,820 | 91% |

The discriminatory and confiscatory character of these rates and the in-between rates (not quoted) is visibly shocking. It approaches incredulity that any part of a taxpayer's income should be subjected to such a paralyzing grab. One might almost stop right here with the assurance that the table carries its own demonstration.

## Progressive Taxes . . . *An Uneasy Case*

It is recognized that progressive rates of income taxation are difficult to justify. They are patently discriminatory, based as they are upon the elusive theory of "ability to pay".

And here is the paradox we live with: The Constitution says that your property shall not be taken without just compensation; but your income and property can be confiscated without limit under the constitutional power to tax.

Professors Blum and Kalven of the University of Chicago Law School in their recent book say this: "The case for progression . . . turns out to be stubborn and uneasy". They conclude: "The case has strong appeal when progressive taxation is viewed as a means of reducing economic inequalities." It might have been more boldly put this way: "Progression embodies as its most active ingredient a 'soak the rich' or 'share the wealth' complex well seasoned with displeasure about the many inequalities which no organized society on earth can remove." You may sprinkle in a lot of envy to complete the mixture. Through the ages a prevalent and festering cause of discontent has been merely that someone else has more. Progressive taxation is the forerunner of an equalitarian society where needs take precedence over abilities, and equity is dissolved in passion and prejudice.

But we are not proposing the abolishment of progression now.

We do propose softening its impact within a framework designed by Representative Antoni N. Sadlak's Bill, H.R. 6452, introduced in the House of Representatives on March 28, 1957. The plan is to accomplish within five years a reduction of the starting rate and a telescoping of the individual surtax rates so that the top rate will be 42 per cent and the starting rate 15 per cent; also to reduce the combined normal and surtax corporate rate to 42 per cent.

The mechanics of the plan give no trouble. They can be varied to suit convenience, while the principle is kept. A short explanation later will suffice.

The plan must stand or fall on its justification. The case for the plan is more important than the plan itself. The first essential is a conviction that the surtax rates for good and sound reasons must come down.

Let us look at some of these compelling reasons:

(1) *Income tax progression is one of the demolition tools of the socialists.* Their strategists say: "Let us have steeply progressive rates in order to sabotage private enterprise and the institution of private property". They want to make every individual a servile minion of the state shorn of freedom to accumulate private means. They know that the earning power of private property constitutes a lasting base of individual liberty.

Another demolition tool of the socialists is the debauching of the money by inflation. We shall have a little more to say about this one later on.

(2) *Our progressive rates work a stagnation or drying up of equity investment capital.* This is so because of their sickening impact upon the taxpayers in the middle and higher brackets. The middle class especially takes a drubbing.

It is pretty well established now that equity capital must eventually come out of the savings of the middle class and above middle class taxpayers. It is also conceded that the capital needs of the country should be largely financed out of savings and not by an excessive expansion of the money supply.

We need only take a hop, skip and jump up the federal income tax rate scale to be amazed at the steepness of the climb. Let us peg the rates at a few stops. Over bracket income of $10,000 the collector begins to snatch 38 per cent; over $16,000, 50 per cent; over $32,000, 65 per cent; over $50,000, 75 per cent; and over $200,000, 91 per cent. Manifest on the face of the rate schedule without more is discrimination par excellence. There is yet to appear one who can successfully refute this.

The natural impression is that such a tax grab is wrong once it is understood. Public sentiment has been so registered in nationwide polls. The "$64,000 Question" program on TV shocked people into the realization that the winning of the second $32,000 would cost a winner with a $4,000 income about $24,000 in taxes. The first $32,000 would cost him over $15,000 in taxes. To keep $64,000 after taxes he would have to take in $450,000.

The sponsors of the Sixteenth Amendment back in 1913 had a premonition about the possible economic havoc and destruction that would result from exorbitant income tax rates. They realized, of course, that the sky was the limit and that they were empowering

Congress legally to take away the last penny of a taxpayer's income. But they could not imagine nor foresee a rate higher than 10 per cent. Therefore no limit on the rate was incorporated in the amendment. But we have had a look at the rate structure today. If this plundering of the taxpayer had been anticipated in 1913 the Sixteenth Amendment would never have been adopted. If this Amendment were sent to the country today together with the history of its application it would not be ratified.

And here is a most significant fact that few people realize: The overtaxation in the middle and higher brackets produces only a small proportion of the total income tax revenues. The graduated surtaxes produce only about 17 per cent, or about $5½ billion while the starting rate of 20 per cent produces 83 per cent, or about $26½ billion.

The progressive elements in all surtax rates above 34 per cent now produce only $3½ billion in taxes.

If the Federal Government confiscated all taxable income above $10,000 per taxpayer it would by that drastic progression take in only about $4½ billion over and above the $5½ billion now taken, or about 1/15 of what it takes to run the Federal Government a year.

The punitive character of the rate progression stands out boldly. Seventy per cent of the taxable individual income falls in the brackets below $5,000. The federal expenditure budget can never be met by squeezing dry the taxpayers in the middle and higher brackets.

## A Far Greater Danger . . . *Stifled Incentive*

But rate progression in our federal tax system does far greater damage than to confiscate savings for capital investment. It stifles the incentive to earn, to produce, to save and to invest. In fact, this is common gossip in the market place. The widespread pressure for relief provisions in the Revenue Code is strong prima facie proof of the injustice of present rate progression. When money can no longer earn a fair return after taxes for investment risk the middle class is liquidated.

The chief incentive offered by business is financial profit. That incentive atrophies if the reward is not worth the struggle.

The rate of return is a controlling factor in taking investment risk.

Suppose an investment pays 5 per cent per annum. The rate of return on this income falling within the bracket of $16,000 to $18,000 is 2½ per cent; within the bracket of $22,000 to $24,000, 2.05 per cent; within the bracket of $50,000 to $60,000, 1.25 per cent. The rate of return progressively declines as the altitude of the income brackets increases.

Such returns hardly justify putting equity capital to work. America was not built on such trifling compensation for risking capital.

The squeeze of rate progression takes from individuals money that should be invested in business, industry and production. Saving for investment should be a natural and normal process controlled by individual choice and selection.

To the extent that the furnishing of equity capital ceases to be a privilege and responsibility of private investors the strength of the capitalistic system declines and eventually statism takes over while free enterprise is suffocated.

Government cannot successfully determine the employment of capital so as to preserve that all important essential of versatility in investment. Government interventions always produce an imbalance between production and the demands of a free market—so true of discriminatory taxation.

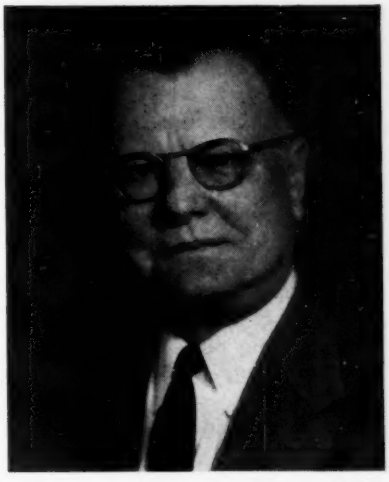
Our present federal tax structure is a perfectly fashioned instrument of paternalism—for government control and manipulation of the national economy.

The progressive rates we have now assess a drastic penalty against the efficient and successful. A young man today starts on a treadmill insofar as savings are concerned. We hear much concern expressed for the small businessman that does not square with our shackling tax policies. We appear to say to him: "The government should guide and keep you; should see that you advance your prospects and make your business grow." At the same time the larger he grows the more the government demands in taxes. Uncle Sam proposes to fatten the small businessman and then process him in the graduated tax mill.

There are other indirect effects upon the size of business units. Taxes—and we include here estate and gift taxes—are a mischievous force that is inevitably furthering the concentration of economic power in this country. With excessive taxation the small closely held business finds it difficult to survive, the promises of government largesse notwithstanding.

The most effective tonic that could be prescribed for business small and big is tax reduction.

(3) *The present progressive rates create pressures for further inflation.*



Golling

**Charles W. Briggs was born in Iowa and received his B.A. from the University of Iowa and his LL.B. from Harvard Law School. He was admitted to the Iowa Bar, elected Prosecuting Attorney and practiced there until he entered the military service in World War I. In 1919 he was admitted to the Minnesota Bar and has since engaged in general practice in St. Paul, where he is now the head of his firm.**

Here we come to grips with a twin despoiler of ancient lineage—that soothing syrup used by nations to dull the pain of economic troubles.

We still like the taste of this economic panacea. While the left arm of the government is raised to ward off inflation, the right arm is feeding inflation by increased spending.

Inflation is a palliative for high taxes. It is a process of attempted recoupment of business costs including taxes. Buying power in the market has been and is created by expansion of bank loans. Increased costs including taxes add to needs for credit. As bank credits go up so does the money supply which accelerates the chase after commodities.

Taxpayers subjected to present taxes and increases in other costs of operation will employ every legitimate means to protect profit levels after taxes and to accumulate reserves of capital.

Inflation appears to be the seductive answer. The popular thing is to keep a central blood-bank of tax money and credit under federal auspices. Transfusion will be ready whenever and wherever even a slight anemia shows up in the boom. Any drop in prices is a signal for the economic doctors to go into action. It probably has occurred to them that the anemic condition in the economy is due to draining of the tax blood from their patients in the first place.

Right now as costs go up we have the perfect climate and mood for further inflation. Will we succumb again? We are familiar with the factors and conditions that constitute the potential push up the inflationary spiral. They make a dismal record in history.

Inflation has enabled producers for a time to keep ahead of increased costs, including even inordinate taxes. It has made possible self-financing on a large scale.

The docility with which even preposterous levels of taxation are accepted by some is hard to explain. Many taxpayers seem to be saying: "You might just as well relax and enjoy it".

The explanation must lie in the compensating antidote of inflation—that most insidious of all social thefts. There is even now building up a tremendous demand for more bank loans and consumer credit.

## Unless We Know the Past . . . *We Shall Repeat It*

But there is one dismal fact of history we should never forget. It is that no established program of manufacturing an excessive supply of money or other circulating media in order to present a captivating mirage of prosperity can be stopped short of economic disaster. We can well profit by the wise words of Santayana: "He who does not know the past is doomed to repeat it."

We are aware that the reduction of income taxes may have two opposing influences: (1) the increase of buying pressures which is a factor in the generation of inflation; (2) a decrease in the tendency to replenish capital out of the fruits of inflation.

Which factor predominates in immediate influence depends largely upon where in the income scale the tax reductions are made. If they are made in the lower income brackets consumption power will be raised more than if they were made in the middle and higher brackets. In other words, a pattern of reduction that accrues more largely to the middle and higher brackets may be expected to release less in consumption expenditures and contribute more to capital formation than a pattern which accrues to the lower brackets. The percentage of income consumed declines as we move up the income scale, whereas capital for risk investment comes largely from the middle and higher brackets. Therefore it is logical to expect that a lowering of the surtax rates would diminish the urge to foster and make use of the usual inflationary formula to make capital available to business and industry.

Formulating a tax program that does not in operation induce inflation as a palliative would in the end prove to be of everlasing benefit to a sound and free economy.

We should not become addicted to perpetual inflation as the only relief from taxation and the open sesame to prosperity.

(4) *The harshness of rate progression drives taxpayers to the practice of tax circumvention.*

There is an irresistible impulse to resist plunder whether or not it is officially perpetrated. It has been commanded throughout the ages of human experience: "Thou shalt not covet nor steal."

There is another far reaching consequence of steep progression. Business and estate plans are cast in weird and unnatural forms in order to stay the tax collector's hand. All our affairs are enveloped in a smog of taxation.

Inevitably we come to a diversionary twist employed by the opponents of surtax reduction.

We are all familiar with certain provisions in the Revenue Code that operate in some instances to mitigate the harshness of progression.

Now unfortunately all these relief provisions have been classified as "loop holes". Sometimes they are mistakenly called "erosions of the tax base". Whatever the designation, the impression sought to be created is that the relief provisions in the Code are specially designed escape hatches. Through these escape hatches the unworthy taxpayers in the high brackets are supposed to be freed from discriminatory tax burdens. All this is pictured as an outrage upon the over-all statutory purpose and intendment to soak progressively taxpayers in the higher brackets.

But it is admitted that after the so-called "loop holes" are closed by elimination of the relief provisions, reduction in the steepness of progression would be in order.

This is not the frank and effective way to deal with a suspected evil. It seeks to avoid meeting directly and on the merits the charges lodged against present rate progressions.

Let us begin our search for a remedy where the major trouble started. We may find that we lost an important part of our birthright as free men when the Sixteenth Amend-

ment was adopted without any rate limitations. The surtax rate should first be brought down to reasonable levels. Then these relief provisions can be examined systematically and fairly each on its own merits. Many of them affect taxpayers of every degree—personal exemptions, for instance. Many are by no means of universal application—exemptions for co-operatives, for instance. Most of them have already been amply justified and should not be repealed no matter what the tax rates are.

Any attempt to make elimination of relief provisions a condition precedent to moderating rate progression will end in no tax amelioration for the middle and higher brackets.

Over-all tax rates should be made fair to all. They should not inflict unjust punishment upon any taxpayer because another escapes them.

## The Sadlak Bill . . . *A Feasible Plan*

Now as to cutting down the tax rates. The plan is feasible because the margin for tax reduction is provided by economic growth.

We assume an expanding American economy. As the economy expands so does the amount of federal tax revenues from any given set of rates but in greater proportion.

Under the plan proposed in Mr. Sadlak's Bill, the co-ordinated reductions in the individual rates over a five-year period beginning January 1, 1958, would take place as shown in Table I.

Table I

**Individual Tax Rates**

| Taxable Bracket* (Thousands) | Present | January 1, 1958 | January 1, 1959 | January 1, 1960 | January 1, 1961 | January 1, 1962 |
|---|---|---|---|---|---|---|
| $ 0 - 2 | 20 | 19 | 18 | 17 | 16 | 15 |
| 2 - 4 | 22 | 20.5 | 19.5 | 18.5 | 17.5 | 16 |
| 4 - 6 | 26 | 24.5 | 23 | 21.5 | 20 | 17 |
| 6 - 8 | 30 | 28 | 26 | 24 | 21 | 18 |
| 8 - 10 | 34 | 31 | 28 | 25 | 22 | 19 |
| 10 - 12 | 38 | 35 | 32 | 28 | 24 | 20 |
| 12 - 14 | 43 | 39 | 35 | 31 | 26 | 21 |
| 14 - 16 | 47 | 42 | 37 | 32 | 27 | 22 |
| 16 - 18 | 50 | 45 | 40 | 35 | 29 | 23 |
| 18 - 20 | 53 | 48 | 42 | 36 | 30 | 24 |
| 20 - 22 | 56 | 50 | 44 | 38 | 32 | 25 |
| 22 - 26 | 59 | 53 | 47 | 40 | 33 | 26 |
| 26 - 32 | 62 | 55 | 48 | 41 | 34 | 27 |
| 32 - 38 | 65 | 58 | 51 | 43 | 36 | 28 |
| 38 - 44 | 69 | 61 | 53 | 45 | 37 | 29 |
| 44 - 50 | 72 | 64 | 56 | 47 | 38 | 30 |
| 50 - 60 | 75 | 66 | 57 | 48 | 39 | 31 |
| 60 - 70 | 78 | 69 | 60 | 51 | 40 | 32 |
| 70 - 80 | 81 | 71 | 62 | 52 | 41 | 33 |
| 80 - 90 | 84 | 74 | 64 | 54 | 44 | 34 |
| 90 - 100 | 87 | 76 | 66 | 56 | 46 | 36 |
| 100 - 150 | 89 | 78 | 68 | 58 | 48 | 38 |
| 150 - 200 | 90 | 80 | 70 | 60 | 50 | 40 |
| 200 - over | 91 | 82 | 72 | 62 | 52 | 42 |

* After deductions and exemptions.

Table II

**Corporate Tax Rates**

| | Present | January 1, 1958 | January 1, 1959 | January 1, 1960 | January 1, 1961 | January 1, 1962 |
|---|---|---|---|---|---|---|
| Normal Tax* | 30 | 28 | 26 | 24 | 23 | 22 |
| Surtax** | 22 | 22 | 22 | 22 | 21 | 20 |
| Combined Tax Rate** | 52 | 50 | 48 | 46 | 44 | 42 |

* On all net income.
** On net income exceeding $25,000.

It is also proposed in the bill to reduce the corporate income tax rates over the same period by the steps shown in Table II above.

We assume a conservative average economic growth of 3 per cent a year during the next five years measured by physical volume of goods and services.

To assure the realism and feasibility of the tax reduction plan it is not necessary to predicate economic growth upon inflation.

Time will not permit going into detailed financial and economic figures. They do support a conservative estimate that over a period of five years expansion of the revenue base would amply justify the proposed tax reductions and leave a balance for further reductions or for debt retirement.

It is sometimes asked by taxpayers who support the plan, why not a top tax rate of 50 per cent instead of 42 per cent? Let us point out that the difference in taxes collected under the present rate schedule would be only about $250 million. If the top rate were reduced to 35 per cent that difference would approximate about $1 billion. Compare these differences with an expenditure budget of $72 billion projected for fiscal 1958. It is estimated that at the end of five years the resultant annual tax saving to individual taxpayers would amount to $10.6 billion and that the corporate tax savings would amount to $4.2 billion. These sums so released from taxation would then be available for private investment.

Let the legal profession weigh carefully the idea that the primary function of taxation is to parcel out the wealth and income of the nation under a controlled economy. The consequences of its implementation

may be catastrophic.

Thomas Babington Macaulay left us a striking formula for the preservation of individual liberty and free enterprise. The above tax reduction proposal is in keeping. He said: "Our rulers will best promote the improvement of the people by strictly confining themselves to their own legitimate duties; by leaving capital to find its most lucrative course, commodities their fair price, industry and intelligence their natural reward, idleness and folly their natural punishment; by maintaining peace; by defending property, by diminishing the price of law and by observing economy in every department of the State . . . Let the government do these—assuredly the people will do the rest."

## Views of Our Readers

*(Continued from page 492)*

Mr. David G. Bress of the District of Columbia Bar [43 A.B.A.J. 127 (February, 1957)] and was extremely and favorably impressed.

I am a neophyte in this wonderful profession of ours, at least comparatively so, having been admitted to the Bar in 1954, and I will undoubtedly see many changes in the law in, what I hope will be, my many years of practice. I do not believe that I could personally be more pleased than to see a nationally universal rule patterned after Mr. Bress's article.

However, one question does come to mind, which may not be any problem at all as a practical matter. Could it be that juries may initially tend to determine the proportional comparative negligence, without first determining whether or not the plaintiff, for example, was negligent at all? Putting it another way, is there a problem of juries mitigating, so to speak, when the facts do not reasonably support negligence on the part of the plaintiff?

I only suggest the above as grounds for further argument and not by way of criticism.

PAT W. ARNEY

Coeur d'Alene, Idaho

## *Lord Erskine on Legal Insanity*

The articles in the AMERICAN BAR ASSOCIATION JOURNAL relative to the legal test for insanity have been most interesting.

In connection with this subject there is a most interesting speech by Lord Erskine in defense of one James Hadfield who was accused of high treason encompassing the death of the King. The defense rested entirely upon the ground of the prisoner's insanity. An editorial comment upon this speech is as follows:

> Of Mr. Erskine's famous argument in this case it has been well remarked, that "It is now, and ever will be, studied by medical men for its philosophic views of mental diseases—by lawyers for its admirable distinctions as to the degree of alienation of mind which will exempt from penal responsibility —by logicians for its severe and connected reasoning—and by all lovers of genuine eloquence for its touching appeals to human feeling."

Briefly, the facts established that the defendant fired a shot at the King but missed him. The defendant at the time was possessed with the notion that his immediate death by violence would produce some great benefit to the human race, and that he therefore determined to shoot the King and thus secure his conviction and execution for high treason. This speech in defense of James Hadfield is found in "Erskine's Speeches" by James L. High, Volume 4, beginning at page 163. These speeches were published by Callaghan & Company in 1876. . . .

B. F. MAXWELL

District Court of Iowa
Tipton, Iowa

## Munich Law Library Open to Visiting Lawyers

American attorneys having business in Germany will probably be interested in learning that there is, in Munich, a newly organized International Law Library at their disposal.

This library is maintained in the American tradition, with free admission to everyone, with direct access to open shelves and with ample desk space for work. It is comfortably housed in a newly modernized building of the University of Munich, near the center of the city. The library is operated as a nonprofit corporation under the surveillance of members of the law faculty and the Institute for Comparative Law of the University of Munich.

Future plans include the possible addition of an educational service through pamphlets or letters, covering specific practical subjects or questions on which foreign attorneys with business in Germany may wish to be informed. . . .

EVA M. VON WEGERER
*Law Librarian*

Internationale Rechtsbibliothek
Munich, Germany

# Lawyer Referral Services:

# They Are Important to Lawyers and the Public

by **Orison S. Marden** • ***Former Chairman of the Standing Committee on Lawyer Referral Service of the American Bar Association***

The American Bar Association, representing our ancient and honorable profession at the national level, is earnestly seeking by all proper means to increase our usefulness to the public we serve. This is both our right and our duty, for the public has granted an exclusive franchise to the legal profession. None but the lawyer can lawfully give legal advice. We therefore owe a corresponding duty, as a matter of professional obligation and simple good faith, to serve all who need our services.

To this end the House of Delegates of the American Bar Association several years ago adopted a statement of the six major long-term objectives of our profession. The second of these objectives records our promise to serve all who need legal services at a cost within their means.

Legal Aid facilities to handle civil and criminal matters constitute one important segment of the over-all plan. These community law offices provide legal service for those who cannot pay a lawyer for the legal representation they need.

People of wealth and experience have never had difficulty in finding legal talent to protect their rights.

But what about the great mass of our citizens, neither poor nor wealthy—who far outnumber the other two groups combined? Many, perhaps most, members of this so-called middle income group do not know when they have a legal problem. Many of these would not know where to turn if they did. They consult a lay friend or the grocer or the bartender or a notary public or real estate agent. Only a small percentage are accustomed to lawyers. Surveys have shown this over and over again.

The plain truth is that the inexperienced are often afraid of lawyers, associating them with times of trouble and death, with automobile accidents and the arrest court.

They do not appreciate the value of having a lawyer's advice before taking important steps rather than after the fat is in the fire. Even when circumstances virtually force the seeking of legal representation, it is done painfully, reluctantly, fearfully. The average family will promptly call in the doctor when young Johnny has a stomach ache, but they will hesitate to consult a lawyer when they buy a house.

How can we educate the general public to let us use our skills and experience to serve their interests? That is a problem which has engaged the attention of many a bar association committee—at national, state and local levels. And it is being solved, I believe—due in large part to the excellent leadership of the Public Relations Committee of the American Bar Association in recent years.

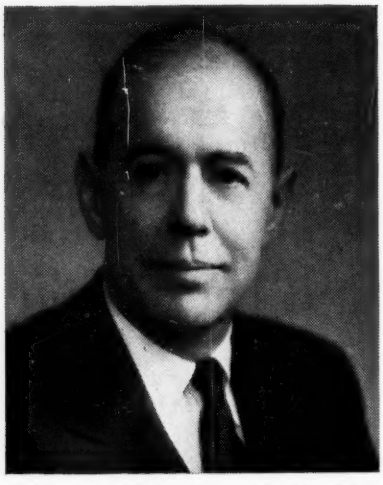
Much of the educational work, of course, is done through lecture programs, T-V and radio, pamphlet material and advertisements sponsored by the organized Bar—all designed to alert the public to the serious problems involved in many day-to-day transactions, and to persuade the inexperienced that lawyers are to be trusted, not feared; that our fees are relatively modest and well worth the amount charged.

But many people do not know how or where to get legal advice even when they come to realize that they need it.

That is where the Lawyer Referral Service comes in. The title may seem formidable, but this is really a simple plan for introducing to lawyers persons who need legal advice but do not know a lawyer or how to find one. The Services are sponsored by local bar associations as a public service. They conform to all ethical requirements.

How does the Service work? It is really quite simple, although there are eight basic requirements:

1. There must be bar association sponsorship. This is essential to reassure the timid prospect and make him forget his fears and apprehension.
2. There must be a supervising



**Orison S. Marden practices in New York City and is a former Chairman of the American Bar Association's Committee on Legal Aid Work. He has been interested in the legal aid program for many years and has worked on it with The Association of the Bar of the City of New York, the New York Legal Aid Society and the National Legal Aid Association.**

committee to ensure that the Service is handled correctly and fairly.

3. There must, of course, be a panel of lawyers. This may consist of all the lawyers in the community who volunteer to serve or it may be a screened list.

4. There must be a person to do the referring. He or she may be a court clerk, a lawyer, a secretary of the bar association; in fact, anyone in whom the Bar has confidence, and who will give a courteous reception to the confused and sometimes suspicious people who come in.

5. There should be a fixed fee for the initial consultation. This is important. By means of the fixed fee the public is assured that for the first conference with a lawyer the charge will be no more than $3 or $5, or whatever fee is fixed by the local association. This dissipates common fears of a high fee and brings lawyer and client together in an atmosphere favorable to future relations.

6. Agreement by the bar association committee to arbitrate any dispute as to fees is desirable, though not essential. This gives further assurance of fairness to the public.

7. A system of publicity is desirable. This is to let the public know of the service; and

8. Lastly, there should be a system for keeping proper records so that statistics may be maintained both locally and nationally.

In practice, under most referral plans, applicants are referred to lawyers on a rotation basis. It is preferable to give some discretion to the person who does the referring; but there must be no favoritism and the Bar must have confidence in the operator of the plan.

After the referral is made the ordinary relationship of lawyer and client follows. Arrangements as to charges for future services, if any, after the original fixed-fee consultation, are made between lawyer and client just as if the client had been referred by a friend or another client. There is no interference with the relationship by the bar association or the Service unless there should be a dispute concerning the fee. As already stated, it is desirable that the public be advised that if there should be any dispute as to fee it will be resolved by the supervising committee or by arbitration as the Association may determine. This gives assurance to the wary and inexperienced.

Essentially, then, the Lawyer Referral Service is nothing more than an information bureau to which two or three important "ornaments" have been added. The first is bar association sponsorship, so important to give confidence to the timid. The second is the fixed-fee for the initial consultation, which also helps to get the prospective client into the lawyer's office. And, lastly, the provision for bar association arbitration of any dispute as to fee promises the inexperienced person that he will be fairly treated.

In practice, the Service has proved to be excellent public relations for the profession. It is also a good source of business for the local Bar, particularly for the younger lawyers.

Three misconceptions about the Service are rather common and should be mentioned briefly:

First, the Service does *not* interfere with existing lawyer-client relationships. Instead, it brings to lawyers as clients persons who probably would not otherwise receive the legal advice they need. National statistics show that 80 per cent of those who consult Lawyer Referral Services have never consulted a lawyer before. When applicants seeking a referral already have a lawyer, they will usually not be referred.

Second, the Service is *not* a cut-rate service and minimum fee schedules are entirely in order. Of course, most of these cases are apt to be small, and the lawyer will sometimes have to adjust his charges to meet conditions, just as he does with clients who come to him from other sources.

Third, the Service is *not* a step toward socialization of the profession. On the contrary, it is an important move forward in educating the public to use the services of lawyers and in making it easier and more convenient for them to do so. It is a public service that will be appreciated by the people of most communities and will bring credit as well as new business to the Bar.

The first Services were started in the larger cities twenty-seven years or so ago. They are now spreading to many smaller cities and counties. More than a hundred are in operation today in all parts of the country.

In fact, well-operated Services in certain smaller cities have produced more business for panel members than in some of the largest cities. The Bar is proportionately smaller in these cities, and potential business (of which, as a profession, we have only scratched the surface) is relatively the same.

The Standing Committee on Lawyer Referral Service is anxious to help local bar associations, large and small, to establish these useful Services. The Committee has handbooks and pamphlets and has accumulated considerable experience. Our hope is that many more bar associations will give the Committee an opportunity to use these tools. A letter to the American Bar Center, Chicago 37, or to the Chairman, Walter T. Fisher, 135 South La Salle Street, Chicago 3, will receive prompt attention.

# The Segregation Cases:

# A Judicial Problem Judicially Solved

by George L. DeLacy • *of the Nebraska Bar (Omaha)*

**Many of the critics of the Supreme Court's decision in the School Segregation Cases, which overturned the sixty-year-old separate-but-equal doctrine of Plessy v. Ferguson, have charged that the Court's ruling amounts to a usurpation of legislative power. Mr. DeLacy disagrees. In this article, he re-examines the Plessy case (which dealt with transportation, not schools) and the six cases handed down on the subject between 1896 and the opinion in Brown v. Board of Education. He concludes that the Plessy doctrine was by no means as firmly embedded in constitutional law as its mourners believe. The Supreme Court, he says, was faced with a constitutional question, and in answering that question it was only performing the function that our system of judicial review imposed upon it.**

Plaintiffs were Negroes seeking injunctions in various states against the enforcement of statutes permitting or requiring racial segregation in public schools. One case was from Kansas, one from South Carolina, one from Virginia and one was an appeal from the judgment of the Supreme Court of the State of Delaware. This latter case enjoins state officials from refusing Negro children admittance to the schools for whites. These cases were heard together. Mr. Chief Justice Warren delivered the opinion. These cases involve the question of whether state statutes were valid which required or permitted the segregation of the Negroes in separate schools even though the facilities furnished, *i.e.*, the school curricula, etc., were equal.

The plaintiffs alleged that they were deprived of the equal protection of the laws within the meaning of the Fourteenth Amendment to the United States Constitution which was adopted in 1868.

In the South, in 1868, there were very few common schools supported by general taxation. Education of white children was largely in the hands of private groups. Education of Negroes was almost non-existent and practically all of the race was illiterate. In fact, the education of Negroes was forbidden by law in some states. In the North, public education did not approximate today's conditions. Compulsory school attendance was virtually unknown. In the first cases involving this amendment, the Supreme Court interpreted the amendment as proscribing all state-imposed discriminations against the Negro race. *Strauder* v. *West Virginia*, 100 U.S. 303.

The doctrine of "separate but equal" did not make its appearance in the United States Supreme Court until *1896* in the case of *Plessy* v. *Ferguson*, 163 U.S. 537. This case involved *transportation*. Since the *Plessy* case, there have been six cases in the Supreme Court involving the separate but equal doctrine in the field of education. In two of the cases the validity of the doctrine itself was not challenged. It was assumed to be correct. In the other cases, inequality was found in that specific benefits enjoyed by white students were denied to Negro students. Therefore, in those cases, it was not necessary to re-examine the doctrine to grant relief to the Negro plaintiffs.

In the case of *Sweatt* v. *Painter*, 339 U.S. 629, the United States Supreme Court reserved decision on the question of whether *Plessy* v. *Ferguson* should be held inapplicable to public education. In the last mentioned case, the Court found that a segregated law school for Negroes could not provide them with equal educational opportunities. The Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school". In *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, the state statute required that a Negro, while admitted to a white graduate school, was

nevertheless to be treated on a segregated basis. The Court held he was to be treated like all other students. The Court again resorted to intangible considerations—his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession.

Mr. Chief Justice Warren comments stating in the subject case that, as applied to children in grade and high school, the separation of Negro children from others of a similar age and qualifications, solely because of their race, generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation, he said, on their educational opportunities is still more detrimental where it is authorized by statute. In the opinion there is a quotation purporting to be from the lower court's decision in the case coming up from Kansas, in which the Court found:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of the law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

Then Mr. Chief Justice Warren says:

> Whatever may have been the extent of psychological knowledge at the time of Plessy vs. Ferguson, this finding is amply supported by modern authority.

He then cites in the footnotes certain authors to the effect that discrimination has an effect on personality development.

These are the authorities (cited in the footnotes) that former Mr. Justice Byrnes attacks, that is, he states that some of them have belonged to subversive organizations. Be that as it may, I do not believe any person of intelligence or education would disagree with the statement made by the lower court in the case coming up from Kansas. The Chief Justice then, after the foregoing quotation, states:

> Any language in Plessy vs. Ferguson contrary to this finding is rejected.

He then states:

> We conclude that in the field of public education the doctrine of [separate but equal] has no place. Separate educational facilities are inherently unequal. Therefore we hold that the plaintiffs and others similarly situated for whom the actions have been brought are by reason of the segregation complained of deprived of the equal protection of the laws guaranteed by the 14th Amendment.

For your information, I will say that in the case of *Plessy* v. *Ferguson, supra,* Mr. Justice Harlan dissented saying:

> Our constitution is color-blind, and neither knows nor tolerates classes among citizens.

## The Trend of Decisions . . . *Away from the* Plessy *Case*

The trend in the decisions of the Supreme Court has been towards the conclusion reached by Mr. Chief Justice Warren. In the earlier case of *Sweatt* v. *Painter, supra,* a Negro was refused admission to the University of Texas Law School on the ground that substantially equivalent facilities were offered by a Texas law school open only to Negroes. Mr. Chief Justice Vinson delivered the opinion. The Court refused either to affirm or disaffirm the doctrine of *Plessy* v. *Ferguson,* but held that the equal protection clause required that the Negro be admitted to the Texas law school since the school for Negroes did not afford equal facilities. However, this conclusion rested on grounds which made it unlikely that it would be possible for a state to establish a law school for Negroes which afforded equal facilities. This case was decided in June, 1950.

In the same month, the decision of *McLaurin* v. *Oklahoma State Regents of the University of Oklahoma, supra,* was decided. The opinion, likewise, in this case was written by Mr. Chief Justice Vinson. In this case the Negro was admitted to the school, but was required to sit at a separate desk, etc. The restrictions on the Negro were in accordance with the statutory requirements of Oklahoma. Mr. Chief Justice Vinson used the following language:

> Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.
>
> It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. Shelley v. Kraemer, 334 U.S. 1, 13, 14, 92 L. Ed. 1161, 1180, 1181, 68 S. Ct. 836, 3 A.L.R. 2d 441 (1948). The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices.
>
> But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.
>
> We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. See Sweatt v. Painter, 339 U.S. 629, ante, 1114, 70 S. Ct. 848. We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races. The judgment is
>
> *Reversed.*

It occurs to me that the Supreme

Court of the United States, when presented with the specific question involved, could not, in the light of its prior decisions in the *Sweatt* case and the *McLaurin* case and in the light of modern thinking on the subject, have held otherwise.

It is my opinion that the attack upon the Court by former Mr. Justice Byrnes is not justified and that his suggestion that some of the authorities mentioned in the footnotes (relative to the effect of discrimination upon Negroes) were written by subversives, amounts to an unwarranted attempt to smear the Chief Justice and the other members of the Supreme Court. It should be remembered that this decision was the unanimous decision of the Supreme Court.

In a recent speech in St. Paul, Minnesota, Judge Irving B. Kauffman, said:

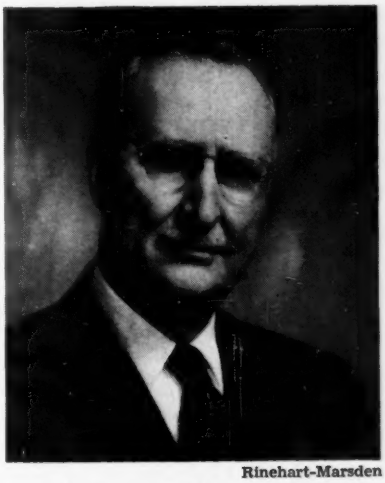
> Americans must guard against striking "blindly at all who espouse an honest and decent cause merely because the Communists are also paying it lip service."

Mr. Chief Justice Warren in writing the opinion followed the trend set forth in the cases of *Sweatt* v. *Painter* and *McLaurin* v. *Oklahoma State Regents, supra,* and also followed the finding set forth in the case appealed from Kansas. I have heretofore quoted this finding. He also considered the cases appealed from Delaware, *i.e.,* the case of *Belton* v. *Gebhart* and in the case of *Bulah* v. *Gebhart* (Consolidated), 87 A. 2d, 862. These Delaware cases involved the question of whether the State of Delaware through its agencies violated the rights of Negroes under the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Negro plaintiffs who brought these actions had been refused admission to the Claymont High School, a public school maintained by the State of Delaware for white children only. They were refused admission solely because of their color and ancestry. However, they were permitted to attend the Howard High School and the Carver Vocational School, both operated by the School District and both operated for Negro children. In the trial of the cases the plaintiffs introduced expert witnesses as to the effect of segregation. These experts sustained the general proposition that the effect of legally enforced segregation in education upon Negro children was harmful. The Court in the opinion says:

> The other experts sustained the general proposition as to the harmful over-all effect of legally enforced segregation in education upon Negro children generally. It is no answer to this finding to point to numerous Negroes who apparently have not been so harmed. It leads to lack of interest, extensive absenteeism, mental disturbances, etc. Indeed, the harm may often show up in ways not connected with their "formal" educational progress. The fact is that such practice creates a mental health problem in many Negro children with a resulting impediment to their educational progress.
>
> Defendants say that the evidence shows that the State may not be "ready" for nonsegregated education, and that a social problem cannot be solved with legal force.
>
> Assuming the validity of the contention without for a minute conceding the sweeping factual assumption, nevertheless, the contention does not answer the fact that the Negro's mental health and therefore, his educational opportunities are adversely affected by State-imposed segregation in education. The application of Constitutional principles is often distasteful to some citizens, but that is one reason for Constitutional guarantees. The principles override transitory passions.
>
> (1) I conclude from the testimony that in our Delaware society, State-imposed segregation in education *itself* results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.

As I said before, the Supreme Court of the United States had before it these decisions which do, in my opinion, evidence a trend away from the case of *Plessy* v. *Ferguson,* decided in 1896. The Supreme Court was presented with the proposition of whether furnishing separate but equal facilities for education was a violation of the Fourteenth Amendment of the United States Constitution. It could not equivocate. It had to hold that it was or was not a deprivation of the equal rights of the Negro citizens as guaranteed by the amendment. It was bound to apply constitutional principles set forth in the Fourteenth Amendment to the question of whether or not a state can permit or require in tax supported schools, *i.e.,* public schools, the segregation of Negro children simply because of their color, assuming as part of the question the fact that the facilities furnished to the colored children were equal; it was bound to pass on the question of whether the simple act of statutory segregation in public schools violated the Fourteenth Amendment.

In my opinion, this was a judicial question and did not at all evidence any intent upon the part of the Supreme Court to legislate. The legal question was whether there was a violation of the Fourteenth Amendment of the Constitution of the *United States.* This question could not be assigned to the state for final determination. The Supreme Court of the United States had the duty to determine whether or not there was a violation of the Fourteenth Amendment to the Federal Constitution. That is all it did.



Rinehart-Marsden

**G. L. DeLacy was born in Sedalia, Missouri, in 1884. He attended Wisconsin and Nebraska Universities, receiving his LL. B. from the latter in 1907. He is a member of the Bar of the States of Kansas and Nebraska and is a past President of the Omaha Bar Association and the Nebraska State Bar Association.**

# Analysis of a Tinderbox:

# The Legal Basis for the State of Israel

by Sol M. Linowitz · *of the New York Bar (Rochester)*

**For almost a year now, the eyes of the world have been glued upon the Middle East. Hardly a week passes that there is not a new crisis in the long, bloody struggle between the Arabs and the Israeli, a struggle that Nasser's seizure of the Suez Canal only complicated. At the same time, few Americans have any real understanding of the background of the situation. The intensely emotional statements emanating from Middle Eastern capitals often give much heat but very little light. Mr. Linowitz sketches the legal considerations in the Arab-Israeli rivalry, beginning with the Balfour Declaration of 1917 and concluding with the establishment of the State of Israel by the United Nations in 1947.**

Countless barrels of blood and many buckets of ink have been poured over the Arab-Israel problems of the Middle East. The vital nature of the issues involved has increasingly led to mingling of political, sociological, moral and emotional considerations in apparently objective efforts to analyze the situation.

Today the State of Israel, born in conflict nine years ago, still lies in the midst of a powder keg. Her 1,700,000 inhabitants live in a country the size of New Jersey and face apparently implacable opposition from their Arab neighbors who continue to assert that the land of Israel is historically and legally theirs. Both in and out of the United Nations, there is again and again heard the argument that the State of Israel was a political creature foisted upon the Arab countries without legal or moral sanction; and that the effect of the new state was to deprive the Arabs of lands to which they were rightfully entitled, ultimately driving into the desert hundreds of thousands of Arab refugees made homeless by an illegal expropriation.

Never was it more important than it is today to understand clearly the respective rights of Arab and Israeli in this matter. And never was there greater need to re-examine with objectivity the legal basis for the State of Israel and the validity of its birth certificate.

This is an effort to explore that question, and that question alone. Political aspects—which have loomed so large in the tragic Arab-Israel story—will be ignored. Sociological and economic considerations will be dealt with only to the extent necessary to permit an objective and informed decision with respect to legal rights involved in the creation of the State of Israel by the United Nations.

The point of departure for a legal analysis of the respective rights and obligations is the Balfour Declaration issued by Lord Balfour on November 2, 1917. The entire text of the Balfour Declaration was as follows:

> FOREIGN OFFICE
> November 2, 1917
>
> DEAR LORD ROTHSCHILD: I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which have been submitted to, and approved by, the Cabinet.
>
> His Majesty's Government view with favor the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.
>
> I should be grateful if you would bring this declaration to the knowledge of the Zionist federation.
>
> Yours sincerely,
>
> ARTHUR JAMES BALFOUR

For over thirty-nine years, English, Arabs, and Jews alike have indulged in partisan research and interpretation of this document and its genesis. The most significant and incontrovertible fact is, however, that by itself the Declaration was legally impotent. For Great Britain had no sovereign rights over Palestine; it had no proprietary interest; it had no authority to dispose of the

land. The Declaration was merely a statement of British intentions and no more. It said that (1) England viewed with favor the establishment in Palestine of a home for the Jewish people; (2) Britain would use its best endeavors to facilitate the achievement of this object; and (3) nothing should be done to prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in other countries.

## The Palestine Mandate . . . *A Jewish National Home*

The true importance of the Declaration lay in the fact that the Preamble to the Palestine mandate issued by the Allied Powers in 1922 specifically recited that Great Britain as mandatory was to be responsible for putting the Declaration into effect. Significantly, it stated that recognition had thereby been given to the "historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country". The mandate was accordingly set up to effectuate these purposes, and Great Britain as mandatory assumed the obligation of exercising the mandate in accordance with the precise terms of the Balfour Declaration.

The mandate device used by the Allied Powers in the Covenant of the League of Nations was an innovation in international law. While President Wilson and General Smuts had conceived of the mandate as a trust arrangement, the other powers had accepted their mandatory roles as a convenient manner of obtaining desired territories.[1] It was, therefore, hardly surprising that the administration of the various mandates was inevitably molded to the political aims of the mandatories. The British action in assigning mandatory functions to the Colonial Office was as frank an indication of this attitude as was their use of the mandated territory of Haifa as a naval base. In short, the British conception and administration of the Palestine mandate must be recognized as part and parcel of a uniform policy.

Article 2 of the Palestine mandate obligated the mandatory to accomplish certain objectives: (1) To place the country under such political, administrative and economic conditions as would secure the establishment of a Jewish national home as laid down in the Preamble; (2) to develop self-governing institutions; and (3) to safeguard civil and religious rights of all inhabitants of Palestine. Article 5 made the mandatory responsible for seeing that no Palestine territory was ceded or leased to, or placed under the control of the government of any foreign power. The administration of Palestine was charged by Article 6, with the obligation of facilitating Jewish immigration into Palestine under suitable conditions. Article 27 required the consent of the League of Nations to any modification of the terms of the mandate.

The touchstone for an analysis of what was sought to be achieved and the method for its attainment lay in the words "Jewish national home".[2] Borrowed from the original Zionist platform at Basel, the words "national home" were novel in the field of international law. The unfamiliarity of the term spawned variegated interpretations of its meaning. By the application of established principles of legal construction, however, its intended meaning could be readily ascertained: The establishment of Palestine as a place to which Jews could emigrate with the understanding that if such immigration should prove to be large enough, a predominantly Jewish state or commonwealth would come into existence. Lloyd George, President Wilson, and various others so understood the term, and their testimony offers an irrefutable "legislative history" of statutory meaning.

Thus, the Report of Palestine Royal Commission of 1937 stated (page 24): "It would depend mainly on the zeal and the enterprise of the Jews whether the home would grow big enough to become a state. Mr. Lloyd George, who was Prime Minister at the time, informed us in evidence that if the Jews had meanwhile responded to the opportunity afforded them by the idea of a national home and had become a definite majority of the inhabitants, then Palestine would thus become a Jewish commonwealth."[3]

Everything in the language of the mandate itself precisely conformed to this interpretation. The mandatory was, for example, directed to take such steps as would secure the establishment of the Jewish national home (Article 2). The administration of Palestine was to facilitate Jewish immigration (Article 6). The administration was to facilitate the acquisition of Palestinian citizenship by Jews (Article 7). The Jewish agency, which was to advise with the Palestine administration, could itself undertake construction or operation of public works, services and utilities subject to arrangement with the administration. (Article 11).

Of equal importance in this connection was the specific provision in the Declaration and mandate for safeguarding the civil and religious rights of existing non-Jewish communities in Palestine. Read in the light of the contemporaneous preoccupation of the Allied Powers with the minorities in other lands, this provision signified the contemplated reduction of the non-Jewish communities to a minority in Palestine and the concern with the preservation of their rights as minority groups.

Over the years, however, both the British mandatory and the Arabs urged other interpretations designed to indicate a contrary policy. The British position was to a large extent based on an interpretation of the particle "in" contained in the term

1. See INTIMATE PAPERS OF COLONEL HOUSE, (1928) pages 293 *et seq.*; Lansing, THE PEACE NEGOTIATIONS (1921) page 149 *et seq.*

2. In the REPORT OF PALESTINE ROYAL COMMISSION (1937) (at page 39) it was stated: "The primary purpose of the mandate as expressed in its articles is to promote the establishment of the Jewish national home."

3. See also Baker, WOODROW WILSON, and WORLD SETTLEMENT, volume 7, pages 256, 305. Also the LONDON TIMES of March 4, 1914, quoted President Wilson as follows: "The Allied Nations with the fullest concurrence of our Government and people, are agreed that in Palestine shall be laid the foundations of a Jewish commonwealth." See also Miller, MY DIARY AT THE CONFERENCE OF PARIS, volume 4, page 263.

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tional home". From the Churchill White Paper of 1922 until the Report of the Royal Commission in 1937, it was maintained that the use of the word "in" signified an intention to establish a national home in a *part* rather than the *whole* of Palestine. This argument was advanced again and again despite the fact that clothing a naked particle with such drastic significance seemed to run counter to the whole mandatory scheme. In Article 25 of the mandate, Great Britain was authorized, with the consent of the Council, to postpone or withhold application of the mandate provisions to Transjordan. By clear implication, therefore, the mandatory would not be in a position to withhold application of the mandate in the rest of Palestine or apply it only to a portion of western Palestine.

The obvious fact is that a time arrived when political considerations became paramount in the English view. This was apparent from the Statement of the Shaw Commission in 1940 that in its opinion the primary duty which was laid upon the Palestine government was one of holding the balance between the two Allies of the validity of the Jewish parties in that country. There was no clear direction, the Commission found, to assist either party in the fulfillment of its aspirations.

(This must be compared, of course, with the letter accompanying the Balfour Declaration by Mr. Balfour to Lord Rothschild as a declaration of sympathy with the Zionist aspirations.)

## Limited Immigration . . . *A Festering Problem*

Even more meaningful, in this regard, however, was the White Paper of 1939, which provided for total future Jewish immigration to Palestine of 75,000; rigorous restrictions on land purchase by Jews; and ultimate establishment of a Palestinian state with Jews as one-third minority. The Permanent Mandates Commission of the League unanimously held this White Paper to be inconsistent with the constant interpretation theretofore placed on the mandate; and a majority went so far as to hold that it was directly contrary to the mandate. Yet the limitation of immigration continued to be a festering problem.

The argument most extensively advanced by Great Britain to support these various curtailments of Jewish migration was based on a reading of Article 8 of the mandate. The administration of Palestine was directed by that article, while insuring that the rights and positions of other sections of the population were not prejudiced, to facilitate Jewish immigration under suitable conditions. This provision had been quite properly construed by the mandatory to authorize the limitation of immigration in accordance with the economic absorptive capacity of the country. The difficulty was, however, that questionable estimates of absorptive capacity were again and again relied upon to justify the restraints imposed.

Cultivable areas were, for example, estimated in the Report of the Palestine Royal Commission on the basis of work methods of the average Arab peasant, not the advanced "establishment *in* Palestine of a na- methods being used by Jewish farmers in Palestine. In taking this position, Great Britain also overlooked the fact that a significant number of objective studies clearly indicated that with proper development of the Transjordan Valley and other natural resources Palestine could settle several million additional persons.

For example, Dr. Walter C. Lowdermilk, Assistant Chief of United States Soil Conservation Service, had estimated that if there were full utilization of the Jordan Valley depression for reclamation and power, at least another 4,000,000 persons could be absorbed in addition to the 1,800,000 already in Palestine and Transjordan. (The fact that there are today 1,700,000 people in the portion of Palestine called Israel certainly tends to support the validity of Dr. Lowdermilk's estimates.) Yet Great Britain chose to reject or ignore such studies; and Jewish refugees from Europe, denied the right to enter legally, entered illegally and under the cover of darkness.

The Arab view of the Declaration and mandate was and is based largely on two contentions: (1) Palestine belongs to the Arabs and cannot therefore become either the Jewish national home or a Jewish state, and (2) the McMahon-Hussein correspondence of 1915 precluded the establishment of a Jewish national home in Palestine.

Without detailed restatement of the arguments as to relative original sovereign rights of Jews and Arabs in Palestine, it is indisputable that the Jews were at one time sovereigns of the land, were deprived of it by force and never renounced their right. Of more importance, however, the Palestine mandate—issued after the Allies had conquered the Turks and Palestine, and after the Arabs had fought with the Turks—specifically recited in paragraph 3 that "recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country". Implicit in this recognition was necessarily the acknowledgment by the Allies of the validity of the Jewish claim to sovereignity. The quarrel of

the Arabs on this score, therefore, has been with the victorious Allies who in solemn proclamation recognized the prior Jewish rights to Palestine.

The second facet of the Arab argument has been that England had, prior to the Balfour Declaration, already committed itself to the Arabs in the McMahon-Hussein letters in favor of the establishment of an independent Arab state in Palestine. The salient facts regarding this correspondence are these: On October 24, 1915, Sir Henry McMahon, High Commissioner for Egypt, seeking to secure Arab assistance against the Turks, wrote a letter to Sherif Hussein of Hedjaz. The letter stated that insofar as England was free to act, she was prepared to recognize and support the independence of the Arabs within certain areas proposed by the Sherif of Mecca. The districts of Mersina and Alexandretta and portions lying to the west of the districts of Damascus, Hama, Homes and Aleppa, were expressly excluded. The tortuous ambiguous language of the letter has been studied with painstaking care. It is sufficient to observe that Sir Henry McMahon himself, Winston Churchill, and two other Colonial secretaries, all agreed that the letter was not intended to refer to Palestine. Even King Hussein's son, Emir Feisal, accepted this view four years after the letter was written. On January 3, 1919, Emir Feisal and Dr. Chaim Weitzman (later the first President of Israel but then representing the Zionist organization) signed a treaty which dealt with the establishment of an Arab state, exclusive of Palestine.

Generally overlooked in the refined search for intentions, however, is the paramount and all-important fact that at the time in question England had absolutely no right of disposition and no legal or proprietary interest in Palestine, which was then a Turkish province. Regardless of what commitment England might have made, she was neither sovereign over Palestine herself nor was her action ratified either by Turkey (the then sovereign) or the League of Nations (the later sovereign). In the Treaty of Sevres in 1920, Turkey renounced her rights to Palestine in favor of the Allies. This Treaty did not become operative, however, and in the Treaty of Lausanne in 1923 (after the Palestine mandate) Turkey renounced all right and title to territories outside of the boundaries laid down in that Treaty, "the future of these territories ... being settled or to be settled by the parties concerned".

This alignment of the respective legal position of the parties to the Palestine dispute led the United Nations in 1947 to the following conclusions: (1) Jewish claims to Palestine were predicated on a formal international document of unquestionable legal validity and supported by the terms and legislative history of the mandate; and (2) the Arab position rested on a claim of prior sovereign rights rejected by the Allied Powers after World War I and on an interpretation of a legally ineffective letter from Sir Henry McMahon.

Accordingly, the United Nations by solemn resolution on November 29, 1947, divided the formal British mandate of Palestine into an Israeli State and an Arab State with Jerusalem as an international city under United Nations supervision. Pursuant to the resolution, the British mandate of Palestine came to an end on May 14, 1948, and the State of Israel was born.

From that day to this there has been no peace in the Holy Land. Aroused and impassioned by fear and suspicion Israel and the Arab States alike have for eight years known only bloodshed and hostility. During that time, Israel, Egypt, Syria and Jordan have all engaged in attack, skirmish and counter-attack. Tonight, as for hundreds of nights before, Arab guards are poised in their watchtowers; armed Israeli men and women crouch over their machine guns; and on each side of the border soldiers wait tense and ready, challenging every sound and shadow.

It would, of course, be illusion to assume that peace in the Middle East can be achieved through legal analysis such as has been here attempted or by judicial dicta, regardless how persuasive. For peace between Arab and Israeli will come only when there is a real will for peace; it will come only when the United States, England and the other countries of the world recognize that what is at stake in the Middle East is crucial to the survival of peace everywhere; it will come only when humility and understanding replace passion and bloodshed on the part of Arab and Israeli alike; it will come only when all concerned truly understand that for world peace to have a firm and solid foundation in our time it must have strong and deep roots in that part of the world where civilization was first born and where the call for universal brotherhood was first heard loud and clear by mankind.

# New Members of the Supreme Court of the United States

## Mr. Justice Brennan

Mr. Justice William J. Brennan, Jr., comes to the Supreme Court with the great advantages of relative youth for such an appointment (he is 51 years of age) and rich experience as a lawyer and as a judge in both the trial and appellate courts of New Jersey. Not the least of his assets is a burning conviction as to the necessity of improving judicial administration by eliminating delay, by putting an end to the decision of cases on technicalities of procedure, and by avoiding surprise in the trial of cases so that decisions will be reached on the merits and justice will be done.

Justice Brennan was born in Newark, New Jersey, educated at the Wharton School of Finance and Commerce of the University of Pennsylvania and Harvard Law School. On graduation from law school he became associated with Pitney, Hardin and Skinner, one of New Jersey's leading law firms, and in due course he was made a partner.

After the passage of the National Labor Relations Act he devoted considerable time to problems of labor and management where he attained a wide reputation for skill. Shortly after the outbreak of World War II he was called to Washington as an expert in labor law, working closely with the late Secretary of War, Robert P. Patterson. For his contributions in this field he rose to the rank of colonel and was awarded the Legion of Merit.

After the war, he returned to his old firm and was active in the trial of cases. By its new Constitution the courts of New Jersey were reorganized, effective September 15, 1948. Four months later Governor Driscoll appointed Justice Brennan, then 42 years of age, to the Superior Court. It was no secret to his intimates that he had long aspired to a judicial career. He was promptly designated by the Chief Justice as Assignment Judge for Hudson County, the second largest county in the state, where he did an outstanding job supervising the work of the trial courts in that county. This naturally led to his appointment to the Supreme Court's Committee on Pretrial Conferences and Calendar Control. In 1950 he was assigned to the Appellate Division of the Superior Court and in 1952 Governor Driscoll appointed him to the New Jersey Supreme Court.

Justice Brennan's interest in efficiency in the trial courts did not abate with his elevation to the appellate bench. He became the Chairman of the Committee on Pretrial Conferences and Calendar Control and filled that post with distinction until his appointment to the United States Supreme Court. On many occasions he spoke in other jurisdictions on the advantages of pretrial conferences and frequently put on demonstrations of its advantages with the aid of various trial judges and trial lawyers. The successive editions of the New Jersey *Manual of Pretrial Practice* is more largely his work than that of any other man.

To cope with the perennial problem of disparity in sentences, he conceived the idea of arranging an annual three-day tour of the penal and correctional institutions of the State with the county judges so that they might have some first-hand experience with what these institutions were attempting to do.

For Mr. Justice Brennan the law is a living reality concerned with human beings, rather than a series of judicial declarations embalmed in judicial opinions. His enthusiasm is contagious and his ability to deal with judges and lawyers is outstanding. While he is keenly conscious of the fact that we live in a constantly changing world, he is equally aware of the fact that human nature changes very little. He is, therefore, instinctively inclined to preserve the essentials of all that is good in the past and to adapt them to the needs of the times.

But one must know Mr. Justice Brennan personally to understand the great joy which he takes in human contacts and especially in his family life.

ARTHUR T. VANDERBILT
Newark, New Jersey

## Mr. Justice Whittaker

Charles Evans Whittaker of Kansas City, Missouri, was appointed Associate Justice of the Supreme Court on March 2, 1957, and after prompt confirmation by the Senate, assumed his duties on March 25. He is the first Missourian, and the first native-born Kansan, who ever has served on the Supreme Court. He was born on a farm in Doniphan County, Kansas, on February 22, 1901. Having completed the ninth grade of public school in his home county, he spent the next three years on the farm and then secured employment as office boy in a trial law firm in Kansas City, Missouri. In four crowded years he made up his work in the high schools of Kansas City and earned his Bachelor of Laws degree from what is now the Law School of the University of Kansas City. The end of the next equally crowded thirty years found him the second ranking member in seniority in the firm of Watson, Ess, Whittaker, Marshall and Enggas; President of the Missouri Bar, Integrated; and engaged in various voluntary tasks of public responsibility. It was then, in July of 1954, that he was appointed to the United States District Court for the Western District of Missouri.

William J. Brennan, Jr.

Charles Evans Whittaker

In this interval he had completed a rigorous internship which was to condition him for the tasks which awaited and still await him. Beginning with the investigation and preparation of jury cases for trial, he soon moved into the trial seat and for ten years was almost continuously engaged in this exacting and fascinating work in the state and federal courts. Pursuing his cases on appeal he was gradually drawn into appellate practice, and, in increasing measure, into the work of counseling on legal affairs generally. Prior to his appointment to the District Bench he had been engaged at one time or another upon every variety of legal problem which would be presented to a large and active law firm in the Middle West. When he was appointed to the court it was known that he was ready. His devotion to the law and his success in the courts had been established and widely recognized.

Upon assuming his duties he attacked a congested docket of accumulated cases with a vigor and zeal which resulted in bringing the docket to current status within the two years of his incumbency. In June of 1956, Judge Whittaker was elevated to the United States Court of Appeals for the Eighth Circuit to succeed the late John Caskie Collet. Eight months later he was named by President Eisenhower as an Associate Justice of the Supreme Court of the United States.

In the opinions written by Judge Whittaker during his tenure upon the Eighth Circuit, no adequate opportunity is afforded to discern the settled patterns of his basic philosophy. There is a simplicity and directness of approach to the problems presented which are characteristic of his personality. In the one dissenting opinion among them there is frankness and punch in the position taken and a clarity of expression which admit of no doubt as to his meaning. While at the Bar Charlie Whittaker practiced law with all his might and while on the Bench gave of himself in the spirit of one who rates justice as the most significant of human institutions. His former law partner, Henry Ess, said of him that "the law is the most important and absorbing interest in his life and even constitutes his chief recreation".

In entering upon the new life there will be a substantial change in levels of work. The interpretation of government under the Constitution largely will supersede the wager of private rights among litigants. A Justice of the Supreme Court must be capsulated in self-restraint; but his record at the Bar and on the Bench proves that this will be no serious problem for Justice Whittaker. His is already a dedicated life. He must draw away from many personal contacts which lighten life and preserve the sympathy and charm of fellowship. Even so Justice Whittaker will have the human touch. His understandings include the habits of mind and thought of litigants, veniremen and witnesses. Thus the feel of people involved in the legal process has been stored in the reserves of his experience.

His opinions reveal a freedom from anything startling or sensa-

*(Continued on page 545)*

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**Signed Articles**
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

### *The Laborer Is Worthy of His Hire*

The article on the English barristers by W. W. Boulton published in this issue is most revealing. We are used to reading the results of surveys in this country which show that the average lawyer here hardly makes a living, but the idea that the 2,000 practicing barristers of England lack finances for the publication of their own journal is a new one for most of us.

On the other hand what could have a more familiar ring to the ears of American lawyers than the discussion of the discrimination against members of the legal profession in respect to tax-free accumulation of pension premiums and the discussion of allowing as income tax deductions expenses in attending international legal conferences! It would seem as though in effect half of the fees charged by barristers would be fixed by the court since the winner's fees are taxed against the loser in an amount determined by the taxing officer. We are not used to that but, again, the dissatisfaction expressed with the scale on which the court awards compensation is not unknown in the United States.

The picture that Mr. Boulton draws is that of an integrated trial Bar with 2,000 active members. Its activities and its problems are almost exactly those of our bar associations. It is only in the financial department that their problems seem more serious than ours. Our admiration and affection for the English barrister, fostered by the visits made to us by men like Barrister Sir Norman Birkett, is such that we cannot with equanimity read ominous words like "the whole future of the Bar may well depend upon whether or not some concession is made" in the fiscal field.

## Editor to Readers

Some weeks ago Professor A. J. G. Priest, of the Law School of the University of Virginia, sent us two editorials by Colonel Hardy C. Dillard, Editor of the *Virginia Bar News,* in which they had appeared. Professor Priest, who was one time chairman of our Section of Public Utility Law, thought they were worthy of wider circulation. We agreed with him. Here they are:

### THE LAWYER AS A PERSON

Lawyers do a lot of things for their clients which cumulatively produce a tolerable degree of cohesion in a society always capable of flying apart. Seen in perspective our job means: patching up social relations, oiling the gears so they don't strip, supplanting chaos with order, protecting the individual against tyranny, seeing that justice prevails. Certainly few callings can lay claim to nobler purposes.

Yet we have known many lawyers—distinguished lawyers—who in the twilight of their careers have wondered about their calling. The day to day service to clients, however challenging at first, seems to have palled. And the noble aims which the law proclaims seem too remote to provide a continued sense of gratification and purpose.

It is no answer to point to civic activities as a way out. The Church, charities, fraternal organizations, clubs—all these things are undoubtedly good. The trouble is that while they command the interest they fail to engage the mind of our lawyer friend who is seeking not a pleasant escape but a challenging outlet.

What are we driving at? The answer lies partially in the little sermon which we venture to preach in the editorial below. To be more explicit we suggest that a lawyer's dedication to his clients is not enough. Indeed, it may even warp his perspective and sense of purpose.

A quickened awareness of the needs of our era—including the need for hard, sober thought—here is the outlet. Legislation need not be left to harassed politicians—hearings beckon. Writing need not be confined to the professional scriveners—journals welcome critical analysis. Public forums need not be dominated by glib orators—searching questions can be put. In short, the interests of our clients need not monopolize our professional lives.

We once knew an eminent lawyer who, in a tax case, had no peer in fighting for his client like a tiger. But when legislators sought his judgment on wise legislation, he subordinated the interests of his client.

A broad gauged student of society, he would probe its needs and the way our tax laws affected it for good or ill. He was sought not because of his clients but in spite of them. He was sought because he realized that a good lawyer is more than a good lawyer. He is first of all a person whose chief client is his own sense of integrity,

dignity and worth. And he is part of a complex national and even international community with interests impinging on all of us.

LAWYERS AND STATESMANSHIP

The lawyer of the mid-twentieth century—it has been perceptively said—is much closer to his colleagues of the late 18th and early 19th centuries than to those who spanned the intervening era.

The 18th century—the century of the American and French Revolutions—was marked not only by physical violence but by ideological turmoil. In such times men are driven to search out the great underlying principles that bind them together. They are not content to dabble with trivialities. Even the polemical literature of the time—as witness Thomas Paine—was charged not with pettifogging niceties but with bigness of outlook and boldness of conception.

Little wonder the great lawyers of the time—the Jeffersons, Madisons, Marshalls and Websters—were more than client lawyers. The role of the statesman serving the nation transcended the role of the technician serving private interests.

The emergence of totalitarianism in the wake of World War I has caused a renewed search for underlying principles and verities. The call to greatness, echoing from an earlier age, requires of our profession a renewed response, a fresh vigor, a sweeping determination to put the interests of commonwealth and nation above the insistent demands of prejudice and the interests of the moment.

What does this rhetoric imply? It implies that we, as a group should reflect much more than we are wont to do, on the meaning of atomic energy in an era charged alike with high promise and potential disaster. It implies that we should seek with good will to understand the racial dilemma confronting us, striving not for cheap tactical victories but for basic solutions and the total good.

It implies that we should grapple with the philosophies underlying our tax structures, not merely wince every time a new law is passed that pinches our clients or ourselves. It implies all of this and more.

For the tone and character of our approach to social problems is more important than specific solutions. The lawyer must bring to their solution the hard, cool intelligence of a disciplined mind, capable of exposing the nostrums of the fuzzy minded while still retaining the vision which the fuzzy minded frequently possess and which we lose only at the peril of becoming petti-foggers. We must not only think, we must think greatly. Accustomed to difficulties we are trained to know that to expect too much too soon is foolish. Yet, as Jowett once remarked, while it is foolish to expect too much, it is to be lacking in faith and courage to dare too little.

Rotarians in London have recently opened a House of Friendship at 21 Portman Square, London, W. 1, and have invited the lawyers attending the London portion of the 1957 Annual Meeting who are members of Rotary International to visit the House of Friendship. This magnificent house, built late in the eighteenth century in a fashionable part of London and possessing many typical Adam features, was recently used by the Royal Netherlands Government as its Ambassador's residence.

## Make Your Hotel Reservations for New York Now!

The Eightieth Annual Meeting of the American Bar Association will be held in New York City, July 14-16, 1957, and will then recess to reconvene in London, England, July 24-30, 1957. Most of the Sections of the Association will meet prior to July 14 in New York, and certain of them will reconvene in London. The January, 1957, issue of the JOURNAL carries a more detailed announcement concerning hotel reservations in New York (page 75), and at pages 435 to 437 of the May issue of the JOURNAL will be found the Program for both New York and London.

Requests for hotel reservations in New York, including members of the Section of Insurance, Negligence and Compensation Law, meeting at The Plaza, July 8-10, should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois, and should be accompanied by payment of the $10.00 registration for each lawyer for whom reservation is requested, UNLESS PREVIOUSLY REGISTERED FOR LONDON, WHICH REGISTRATION FEE INCLUDES THE NEW YORK PORTION OF THE MEETING.

Indicate *three* choices of hotel, type of accommodations, together with definite arrival and departure dates. We regret that space is now exhausted in the Waldorf-Astoria and Ambassador Hotels, with the exception of parlor suites.

Reservations will be confirmed as promptly as possible.

# Books for Lawyers

THE LAW OF FUTURE INTERESTS. *(Second Edition). By Lewis M. Simes and Allan F. Smith. St. Paul: West Publishing Co. 1956. $75.00. Four volumes, Pages clxxii, 2283.*

*The Law of Future Interests* is an up-to-date enlargement of Professor Simes' treatise on the same subject which was published in 1936. As indicated in the preface to this second edition, even the law of future interests undergoes considerable change over a period of twenty years. It is therefore fitting that the only general treatise on this difficult segment of the law of property should have been expanded and modernized.

Apart from its splendid substantive qualities which will be touched upon later, this work is a model of mechanical perfection. Its four volumes are sufficiently small to assure ease of handling by the reader and each contains a complete "Summary of Contents" and a detailed "Table of Contents" which facilitate reference to other volumes when, as so often happens in a complex area of the law, this becomes necessary. The utility of the work is further enhanced by a 247-page Table of Cases (which includes 10,000 cases more or less), a thirty-four-page table of statutes and a seventy-nine-page index. Although index references are to sections (some of which are lengthy) instead of to pages, samplings we have made of the index attest to its adequacy as an aid to research. In this respect the serviceability of the work is also enhanced by generous references in the footnotes at the commencement of many of the chapters to other leading treatises and to pertinent law review articles relating to the particular subject matter under discussion.

The scope of the treatise may be illustrated by reference to its five main parts. Part 1 (394 pages), "The Permissible Types of Future Interests and Expectancies", deals with the various types of future interests which may be created in land and personality, *i.e.,* reversions, remainders, executory interests, rights of entry, etc. Part 2 (462 pages), "The Creation of Future Interests —Construction", discusses construction problems such as whether or not an absolute or a lesser interest is created, the effect of a gift over on "death" or "death without issue", the rules concerning the determination of classes, the Rule in Wild's Case and acceleration. Part 3 (195 pages), "Powers of Appointment", is a well-organized treatise-within-a-treatise on an expanding phase of American property law. Part 4 (521 pages), "Rules Restricting the Creation of Future Interests", is concerned with restraints on alienation, the Rule against Perpetuities, statutory restrictions on restraining the absolute power of alienation, accumulations, illegal conditions, the Rule in Shelley's Case and the doctrine of worthier title. Part 5 (223 pages), "Present Legal Relations of Owners of Future Interests", relates to a group of miscellaneous problems which arise as a result of the creation of future interests, *e.g.,* remedies for waste, protection as to taxes, insurance and mortgages, the right to partition, alienation and devolution, creditors' rights and others. Part 6 (82 pages), "Termination of Future Interests", treats of termination by judicial sale, termination by prescription, by adverse possession and by statute, the effect upon possibilities of reverter and rights of entry, of changes in condition and the effect of impossibility on conditions and limitations. In short, it may be said that every important phase of the law of future interests is encompassed.

Space does not permit a detailed exposition of the analytical character of this work, but a few comments may afford worthwhile illustrations. For example, in the chapter (chapter 39) concerning the Rule against Perpetuities, the authors are not content to outline the historical development of the rule and to discuss its mathematical application. While this is admirably done, pains are also taken to demonstrate the reasons for the existence of the rule, the difficulties inherent in the rigidity of Professor Gray's concept of it (§1222), the infirmities in Professor Leach's "wait and see" proposal (§1230), and the complications engendered by the notion that the rule is directed solely at remoteness of vesting *(e.g.,* §§ 1228, 1230, 1232-1233, 1236). In addition, the treatment of trusts as perpetuities as the subject matter of a separate chapter (chapter 40) is retained. While the decided cases can hardly be said to support the proposition that the common law Rule against Perpetuities or some kindred rule imposes a fixed time limit on the duration of trusts, it must be conceded that any rational rule designed to curb "perpetuities" should probably have some application to the length of time that an indestructible trust may last. The authors' analysis of the situations where such a rule should or should not apply is appealing.

Also illustrative of the authors' analytical, and at the same time practical, approach to the subject matter is Chapter 59 which treats in detail of the termination of reverters and rights of entry by statute or change of conditions, a subject of vital concern to counsel faced with establishing the present indefeasibility of a title admittedly once subject to language of limitation, condition or covenant. The authors first state

the general theory of indestructibility. They then describe the "indirect" effect that a change of conditions has upon this general principle. One of the most graphic illustrations given is *Storke* v. *Pennsylvania Mutual Life Insurance Co.*, 390 Ill. 619, 61 N.E. 2d 552 (1945). There an 1889 conveyance of property then outside Chicago included an anti-saloon restriction in terms appropriate to create at least a condition subsequent. The record established that by 1945, sixteen saloons were operating in the neighborhood and a saloon had been kept on the subject premises for eleven years. It is therefore not surprising that the court refused to enforce the restriction, finding by construction that no language of limitation, no right of entry and no enforcible covenant had been created.

From the summary above of the contents of these volumes it is easy to obtain an idea of the excellence of their organization. From reading but a few excerpts it will readily be seen that the same clarity of expression which characterized the first edition has been maintained. From our necessarily brief comments on substantive matters, our views as to the inherent quality of this treatise must be apparent. It is a first-class work which is the product of first-class craftsmanship. Not only may its authors and publisher be proud of a job well-done; what is more important, they may justifiably feel that they have made a singular contribution to a singularly difficult field of law.

DANIEL M. SCHUYLER
JOSEPH R. JULIN
Chicago, Illinois

AMERICAN DEFENSE AND NATIONAL SECURITY. *By Timothy W. Stanley. Public Affairs Press. 1956. $3.25. Pages 197.*

The biggest business in the world today is the United States Department of Defense. It spends almost two thirds of our tax dollar. It employs more than twice the combined manpower of our ten largest corporations. Whether this monster stands placidly flicking troublesome problems with its tail or charges belligerently into a major conflict, it creates clients with every breath it draws. Thousands of lawyers have been employed or retained in our national defense, not only in attorney positions, but in top policy and staff jobs in the Pentagon and at the White House. As Mr. Stanley points out, this is partially in response to a public demand for civilian control of the military, echoing our traditional reluctance to abdicate defense to a "General Staff". It is also because today's complex issues require the careful analysis that lawyers are trained to supply. Many more thousands of lawyers are frequently consulted on business or personal matters which depend on the attitude and decision of some part of our Defense Department. Although this book is not primarily concerned with the impact of defense on the public or procurement operations, it does deal with the basic mechanisms behind them.

Mr. Stanley, a Connecticut lawyer, is an expert on the organization of the Department of Defense, a graduate of the Department's executive training program. He was granted a leave of absence from the Department to serve as a Research Fellow in Defense Studies at Harvard University on the staff of the Harvard Defense Studies Program. He had an opportunity to study under and with the best defense authorities in the country. This book is the first complete and non-partisan summary of the organization and organizational policies of our National Defense. This is the inside story of Defense.

The book outlines the formal structural evolution of the Department of Defense in which, as in most aspects of government, the interpretation of basic legal documents (some of which are included in the appendix) played a key role. It also exposes the conflicting forces which caused past changes and underlie the pressures for further changes. New weapons and new problems will beget new roles and new missions for the services. The battle for control in the rarified atmosphere of the National Security Council and the Joint Chiefs of Staff will be waged at least partially over conflicting defense policies. A lawyer who deals with government must understand the basic conflicts and he must know the anatomy of defense decisions.

For instance, one very remarkable phenomenon in recent inter-service disputes has been the extent to which the services have sought public and congressional support through public relations techniques either directly, or through their potent lobbies, or, fairly frequently, through leaks to the press. A sensitivity to publicity is exposed which cannot fail to intrigue the sophisticated lawyer. And a power to manipulate public opinion has also been shown, a power which has sobered and alarmed many responsible civilians.

International defense decisions illustrate another source of concern analyzed by Mr. Stanley. It is generally understood that the conduct of foreign affairs constitutes an interplay of political, economic and military factors. The proper analysis of such a problem demands an expert appreciation of each factor. This being so, an international problem requires a lengthy processing by such agencies as the State Department, the National Security Council, the Department of Defense and the President, taking from one week to many months to complete. Obviously, this delay is sometimes unthinkable. The "red tape is cut" or the "proper channels are ignored" (the terminology depending on how you feel about the substantive decision). One question which the author fails to answer is the extent to which the ponderous decision-making machinery he describes creates an inertia which fast-moving events —such as the recent tragedy in Hungary—cannot overcome in sufficient time.

The complexity and urgency of

our defense problems increases as our world grows smaller. The insistent voices of new and bursting nations join the grim cacophony of international politics. Mr. Stanley's book blueprints the organization which we have built to serve our interests. We must understand this organ of our nation. As citizens and particularly as lawyers, we have an obligation to see that it is not wrongly used. We should not permit an ignorance of its structure to obscure the effect and direction of its acts. In fact our clients will demand some awareness of this field. Mr. Stanley's book is properly the "Baedeker" of the National Security structure.

ROBERT COULSON

New York, New York

WORLD WITHOUT BARRIERS. *By Emanuel R. Posnack. New York: William Morrow & Company. 1956. $5.00. Pages xxi, 434.*

On page 383 the author makes the dramatic assertion: "Mankind is trapped." How mankind can be got out of the trap is the argument of this book. The author's final sentence gives us the inspiring goal: "Fed by a fathomless global reservoir of human intellect and energy, and nurtured by the resources of nature, this vitalizing stream ['of manpower, material and information capable of demolishing the divisive barriers that are responsible for our present strife-ridden world'] will enable man to enjoy the fullest use of the world's riches. And it will bring him peace." That will be the *World Without Barriers.*

Listed as "divisive barriers" are such things as sovereignty; land-rights; labor-blocking; barriers to technological development; barriers to trade (tariffs, monetary manipulation and trade-block restrictions, colonialism); speculation; monopoly; barriers to research; barriers to new ventures. (The patent system is ably discussed on pages 271-284 with an attack on the Supreme Court whose "patent-busting" decisions "may spell the doom of patents". "The patent-pirate, the pilferer of patented inventions and designs, openly thumbs his nose at the patentee and the Patent Office, for he is reasonably sure that he has the backing of the federal judiciary". The author is a patent lawyer.)

The elimination of these and other barriers the author considers the goal.

Many writers have speculated about utopias, and their works are often inspiring. The prospect of a socialist *world utopia* must be thrilling to those who welcome a *world without barriers* which they believe is on its way. Mr. Posnack has cleverly based his prognostications—if such they may be called—on trends that cannot be denied: trends which seem to lead to the abolition of sovereignty and man's attainment of a "global feel", overcoming national rivalries. These trends fill the author and others with hope. To many, however, these trends might be regarded as *warnings.* To begin with, the abolition of sovereignty and of land-rights as the first two barriers seems impossible of achievement, at least for several generations, even if the two and one-half billion human beings now inhabitating this earth were all possessed of equal capabilities. Could it not also be argued that in the process of eliminating some of these barriers we shall lose a high degree of our morality and the principles by which we are supposed to live?

Mr. Posnack has in mind another goal for his world without barriers; that is "bridging the gap between East and West". He sees now in progress "the converging of the paths of the American and Soviet spheres". As evidence that these spheres "are in fact converging" he points to "America's drift away from 'rugged individualism' toward *social capitalism*" and Russia's drift toward *"incentive socialism"*. Progress can be furthered, it is asserted, by the United Nations and by the Voice of America in hastening this converging process. In contrast is the pronouncement in the Report of the distinguished Special Committee on the Federal Loyalty-Security Program appointed by The Association of the Bar of the City of New York, published in July, 1956, as follows: "Communism is the weapon as well as the creed of the most aggressive and imperialistic of modern nations. It is a threat to the United States from the outside . . . also from the inside." Barbara Ward in the *New York Times Magazine,* July 22, 1956, describes Communism as follows: "A profoundly reactionary force, fearful of freedom, fearful of change, fearful of the forward march of humanity."

The reduction of the barriers and the achievement of the goals are to be brought about by the "twin technologies, communication and transportation". These are already, in a way, re-making the world before our eyes. By their use, the author believes the "barriers could be virtually obliterated".

This book contains much information about a number of things, simplified for the reader, such things as GATT, OEEC, ORT, IFC, CCC and other alphabet agencies. The author explains the theory of value and money and prices as well, and also in a few words outlines the philosophies of Heraclitus, Aristotle, Fichte, Descartes, Hegel and nine others, ancient and modern.

Of the five parts into which this volume is divided, the first two, running to 215 pages, explain Communism, on the plea that everyone should know what it is so that its weaknesses may be manifest. There is an analysis of Marx's *Communist Manifesto* and Marxian dialectics. Communist economic, moral and philosophical concepts are discussed. Communism in practice is the subject of Part 2; and there are thumbnail sketches of Soviet leaders, including Bulganin and Khrushchev. These first two parts are worth while for their condensed exposition of communist doctrine and Soviet practice; but lack of space precludes a review of them here. It had seemed more logical to review the subject from which the book takes its title.

In his preface, the author states that this volume, attempting to "cover many aspects of thinking and worldly happenings", has been "planned mainly for *popular education*". He would thus regard it as a suitable book for review in the AMERICAN BAR ASSOCIATION JOURNAL –provided, of course, that a competent reviewer could have been found to give it an adequate review.

CHARLTON OGBURN
New York, New York

GENERAL STATE FOOD AND DRUG LAWS–ANNOTATED. *By David W. Vernon and Franklin M. Depew. Chicago, Illinois; Commerce Clearing House, Inc. 1955. $17.50. Pages 804.*

SPECIAL FEDERAL FOOD AND DRUG LAWS–ANNOTATED. *By Thomas W. Christopher and Charles Wesley Dunn. Chicago, Illinois: Commerce Clearing House, Inc. 1954. $26.50 Pages 1334.*

CANADA'S FOOD AND DRUG LAWS. *By Robert Emmet Curran. Chicago, Illinois. Commerce Clearing House, Inc. 1953. $19.50. Pages 1138.*

These three handsomely bound volumes represent the latest additions to the Food Law Institute Series, which is on its way to becoming the Five-Foot Shelf for attorneys working in food, drug and cosmetic law. The series was conceived by Charles Wesley Dunn, co-author of one of the three volumes under review, whose energy brought together into the Food Law Institute the food and drug manufacturers who support it as a public service. It is the Food Law Institute in turn which has sponsored this Series and underwritten the considerable expense of research and publication.

The first volume in the group, Vernon and Depew's *General State Food and Drug Laws - Annotated,* reprints the statutes on adulteration, misbranding and false advertising of food and drugs in the forty-eight states, Alaska, Hawaii, the District of Columbia and Puerto Rico. After the text of the statutes for each jurisdiction there are digests of the decided cases, including some but not all of those construing repealed legislation which in turn is not always printed in the book.

The practical effect of many of these state statutes is suggested by the absence of any appellate cases at all construing such legislation in twelve jurisdictions and the paucity of decisions in the remaining jurisdictions. The wild confusion of state statutes on food and drugs is emphasized by the authors' statement that only about half of the jurisdictions have statutes of any appreciable uniformity or complementary to the Federal Food, Drug and Cosmetic Act of 1938.

A foray such as this into even a small sector of the jungle of state legislation is commendable but some additional signposts for subsequent travellers would have been useful. No cut-off date for the entire compilation is mentioned nor is there an indication for all jurisdictions of the last session of the legislature which is covered. Not all the statutes have cross references to the most commonly used statutory compilation (*i.e.,* there is not a complete cross reference for the Indiana law to the widely used *Burn's Indiana Statutes);* for some sections of various statutes the date of enactment and the session law citation are given, for others not. In some cases voluminous but cryptic citations follow each section (*i.e.,* Iowa). A consistent editorial and typographical policy on the method of citation of session laws is missing (*i.e.,* compare the Louisiana citations with those for the Mississippi and Oregon laws.) The index is of the lean "topical" variety affected by law books. There are no tables of statutes but there is a table of cases.

The difficulties of working with state legislation so as to provide a reliable tool for lawyers seem to have been underestimated by the editors of this book.

A happier story can be told of the second volume, *Special Federal Food and Drug Laws - Annotated.* It is clearly stated to be complete with the appendix to November 1, 1954. "Special Federal Laws" is used to distinguish from the more general Federal Food, Drug and Cosmetic Act and the Federal Trade Commission Act, the statutes collected which deal specifically with meat, certain foods, narcotics, certain drugs and chemicals and some miscellaneous matters. For each statute the text is given in full, ordinarily from the statutes-at-large, with selective citation of legislative history and for the more important laws the regulations issued under them. The annotation by cases decided under the various acts is also selective but on a sensible basis. A table of United States Code citations directs the reader to the pages where each statute can be found. More comprehensive than usual in legal volumes, the index is a real guide to the book.

The final book of the trio, *Canada's Food and Drug Laws,* must rest on the high standing of its author, Robert Emmet Curran, Legal Adviser to the Dominion Department of Health and Welfare. Few United States lawyers can know enough of Dominion and provincial statutes to pass judgment on Mr. Curran's compilation. What he has done is to assemble the Dominion and certain of the provincial laws, and he has supplemented them with the relevant regulations. American lawyers looking for extensive case annotations may be surprised to learn in Chapter 10 that the summary conviction procedure used in enforcement of all but the narcotic laws does not ordinarily give rise to appellate proceedings.

To the lawyer in the United States the most valuable feature of the book is Mr. Curran's own extensive commentary, beginning with an explanation of the classification of "food and drug laws" and their constitutional aspect, followed by a fascinating history and exposition of the Canadian law, all of which precedes the actual text of the statutes.

This represents the first attempt in the Food Law Institute Series to cross from compilation to exposition and it has been brilliantly performed.

An addendum sets forth a new Dominion "Act respecting Food, Drugs, Cosmetics and Therapeutic Devices", comprehensive legislation not yet in effect at the time of the publication. There are separate tables of Dominion and provincial laws and regulations, a table of cases and a truly complete index.

Mr. Curran's volume is certainly the most distinguished to appear in the Food Law Institute Series to date and represents an important contribution to the food and drug law.

WILLIAM TUCKER DEAN
Cornell Law School
Ithaca, New York

INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS. *By Walter Gellhorn. Baton Rouge: Louisiana State University Press. 1956. $3.75. Pages 215.*

This volume contains the three lectures delivered by Professor Gellhorn of Columbia University as the Edward Douglass White Lectures on Citizenship in 1956 at Louisiana State University.

The lectures are devoted to three facets of the never ending swing of the pendulum between individual freedom and governmental restraints, namely, the activities and changing attitudes towards the administrative process, restraints on book reading and finally the fencing in of the right to make a living.

In the first lecture, Professor Gellhorn points to the marked change in attitude toward the administrative process. In the early days he claims the liberals looked with favor upon the growth of administrative processes, but today "The former friends and the former detractors of the administrative process have been circumnavigating the road of government, traveling in opposite directions". He points to the fact that now the administrative bodies are looked to for assistance in directions different from the days of their origins. "I say merely that in the aggregate they reflect a shifting emphasis in governmental activity, a shift away from regulation for the public and toward policing of the public." He makes a neat distinction between the specialists and experts and claims that in many instances decisions are made by specialists in administrative bodies who are not necessarily experts.

The chapter on restraints on book reading covers the interesting subject of censorship, both of the official and unofficial varieties. As to obscenity, he says, "Those who urge increased repression of allegedly obscene books are of course convinced that 'obscenity' can be identified. In reality, however, the word does not refer to a thing so much as to a mood." On the much currently debated subject of juvenile delinquency, Professor Gellhorn says, "Far from discovering that delinquency grew out of reading, the clinicians had discovered that among New Yorkers it is more likely to grow out of inability to read." He queries, "Even if it be true that reading matter may activate impulses of some twisted individual, can this possibility justify repressive policies that affect all alike?" When it comes to Treasury Department restrictive activities, he points to the fact that at one time Kant's *Critique of Pure Reason* and a Spanish translation of the Bible were denied entry. In conclusion, he says, "What we need in this country is not less reading, but more; not fewer poor books, but more good books; not repression, but liberation."

The final lecture tells the interesting story of the increasing use of the licensing requisites as a restraint on the right to make a living, and he indicates that in many instances such legislation has been fostered by those in the trade as a barrier to keep others from competing with them. "What of egg graders and guide-dog-trainers, pest controllers and yacht salesmen, tree surgeons and well diggers, tile layers and potato growers? And what of the hypertrichologists who are licensed in Connecticut, where they remove excessive and unsightly hairs with the solemnity appropriate to their high-sounding title?" There is much difficulty in administration when price-fixing powers are conferred on the licensing bodies and where these Boards are empowered to devise extravagantly difficult entrance requirements. "If dry cleaners and chiropodists and beauticians are to barricade themselves behind licenses, why not farmers and grocers and clothiers as well? Surely their work is as important and their economic problem as urgent, as those of the licensed occupations."

Professor Gellhorn concludes in a brief epilogue that "To remain muscularly free, we must see to it that freedom receives constant exercises". He adds, "The preceding pages do not tell an altogether cheering or comforting story. They reflect the mounting legislative and administrative insensitivity to the dignity of man as an individual. They show a revival of readiness to hobble minds under the guise of mending morals. They depict the gradual closing of the occupational doors through which energetic Americans have been traditionally free to pass in pursuit of their ambitions. For all that, catastrophe is not on our door steps—or even just around the corner . . . this book deals with defects, not disasters; with flaws, not with failures."

LESTER E. DENONN
New York, New York

MUNICIPAL CORPORATION LAW. *By Chester James Antieau. New York: Matthew Bender & Company. 1955. Two volumes. $42.50. Pages 1586.*

THE LAW OF ZONING AND PLANNING. *Third Edition. By Charles A. Rathkopf and Arden H. Rathkopf. New York: Clark Boardman Company, Ltd. Albany: Banks & Company. 1956. $42.50. Two Vol-*

*umes. Pages 1895.*

In no field are the problems more complex or pressing than those faced by local government. Societal stress and strain necessarily become most acute where the most people are found and where the impact of technological development and obsolescense is most directly felt, and thus the governments of urban centers must deal with health, housing, relief, slums, traffic, parking, public safety and other matters of immediate moment to the individual and to the group. The less appreciated but increasingly difficult problems of the rural areas are rightly the concern of some level or unit of local government also. Consequently the law of local governments, which was largely ignored by law schools, bar associations and publishers for a long period, began to receive increased attention after World War II from these groups and from legal writers, practitioners and social scientists as well as a growing list of specialists.

A lack of adequate tools hampered the efforts of all who became active in some aspect of local government, including the lawyers. Much of the excellent writing that had been done was scattered throughout the law and bar journals and was not easy to come by. Gradually this need is being satisfied. Research, writing and teaching have been accelerated in the law schools with the encouragement of such outstanding leaders as Dean Jefferson B. Fordham, whose casebook on *Local Government Law* presented a new and stimulating approach to the field. The American Bar Association's Section of Municipal Law publishes the "Municipal Law Service Letter" with notes of cases, statutes and other materials, and local bar associations are beginning to contribute. In two specialized fields of local government, drainage and levee law, and school law, the Illinois State Bar Association, for example, issues regular newsletters. One of the best known encyclopedic works in local government, McQuillin's *The Law of Municipal Corporations,* was reissued in a twenty-volume third edition in 1949.

With all of this there is still a long way to go before the student and practitioner of local government law can accomplish his research with the ease and assurance that attends the work of the trust or property lawyer, for example. The most readable and authoritative writing in local government law today is done on comparatively narrow issues or in quite specialized areas. This is inevitable, perhaps, in a field preeminently governed by statute, charter and ordinance, and in which classification can result, as in Pennsylvania, in separate statutes for each of eight classes of counties and four classes of cities plus boroughs, a town and two classes of township. Moreover, of course, local government law involves the full range from such "common law" subjects as contracts, tort, property and criminal law to such recently developed subjects as administrative, labor, tax, zoning and planning law with each subject-field interacting with every other one. When a pattern does appear, it may be distorted by the whimsey of a state legislature under the doctrine that municipal corporations are creatures of the state, or by a city under home rule.

The scholar who will brave this situation to provide a general work within a reasonable compass deserves our gratitude. Professor Antieau's two volumes, thanks in good part to an excellent index, will enable a lawyer to obtain a grasp of most of the problems he will meet in dealing with or for the orthodox municipal corporations (although, obviously, a set of local statutes is still an essential). This is much more than a mere collection of cases, for the author provides not only some valuable synthesis but also an informed opinion on many subjects, including the tort liability of municipal corporations and that unhelpful dichotomy of proprietary and governmental functions. Many topics receive superficial treatment—there is little to be learned here of the extremely important governmental unit called an Authority, for example—but this and other shortcomings are the result of the virtue of reasonable size and, consequently, reasonable cost.

Perhaps the most rapidly growing and, certainly, one of the most significant activities of local government is in the field of zoning and planning. Antieau contributes a chapter on zoning but his treatment of planning is inadequate because of space limitations. Since planning is absolutely essential to the survival and rebirth of cities and the successful growth of towns, it requires proper coverage. This is especially true as to the law, for planning by its very nature is unpalatable to Americans and lawyers can make meaningful contributions to society by helping to work out the adjustments between the restrictions imposed by planning and the freedoms we cherish. Here is another place where procedural due process is vital and where the lawyer's ingenuity can be directed toward its preservation consistent with effective government. Much can be learned from the vicissitudes of England, where planning has gone much farther than most American lawyers can visualize and where materials abound. For law schools a first class casebook is now available in Horack and Nolan's *Land Use Controls.* The practitioner is not so well off. The gap in Antieau is filled to some extent by the Rathkopf volumes, although the overwhelming emphasis here also is upon zoning. This is a handbook, stating a vast number of points of law and supporting the statements with citations arranged by jurisdictions. Court opinions are quoted extensively and very little of the authors' own judgments show through. When no apt quotation from a case is to be found, the authors quote McQuillin or one of the general legal encyclopedias. The authors have contributed little or nothing original but they do perform the useful task of concentrating in a small space the leading authorities from each state on most of the propositions the practitioner will need

to look up. Moreover, a wide variety of forms is included along with a section setting forth typical ordinances. There is still a very great need for a constructive, comprehensive text on planning and even on zoning. What can be accomplished in the latter field has been illustrated by a splendid local study by David W. Craig entitled *Pennsylvania Building and Zoning Laws—An Allegheny County Appraisal.* Nevertheless, these two sets, brought up to date by their new editions, are a boon to the struggling local government lawyer.

WILLIAM F. SCHULZ, JR.
University of Pittsburgh

GRINGO LAWYER. *By Thomas W. Palmer. University of Florida Press. 1956. $3.75. Pages 172.*

This is quite an interesting little book by an Alabama lawyer most of whose work was connected with, and was in, Latin America.

Mr. Palmer was born in aristocratic old Tuscaloosa, Alabama. He completed his college work there at the University (University of Alabama, you hick!), got his law degree from Harvard Law School, studied Spanish law in Spain under a Sheldon Scholarship, served in World War I and was mustered out with the rank of captain. Then he accepted employment from Guggenheim Brothers in a position in Chile. Then followed his practice and experience in Venezuela, Peru, Bolivia, Argentina and Colombia. Some years afterward Mr. Palmer came back and practiced law in New York, making his home in Scarsdale, later making a series of trips to Brazil and Cuba.

All of this makes interesting and not heavy reading, and the book is suffused with a number of humorous incidents and throws a somewhat new light on the position of an American lawyer in South America.

Mr. Palmer received many of the highest orders of the various Latin countries south of us, but most prized of all to him was the degree of Doctor of Laws received in 1954 from his old alma mater, the University of Alabama.

This little book is entirely unpretentious, amusing in spots and definitely readable.

PHIL STONE
Oxford, Mississippi

## President's Page

*(Continued from page 483)*

When properly conducted, a jury trial does much to educate the public in the value of the privileges granted by the Bill of Rights, and I for one, hope that I shall not live to see the day when it is wholly abolished.

Justice Brennan was one of a galaxy of Bar and judicial leaders in the star-studded Denver program. Registrations totaled 900 lawyers and judges, not counting wives and guests. Program participants included Associate Justice Charles Evans Whittaker of the Supreme Court; Deputy Attorney General William P. Rogers; Judge Irving R. Kaufman, of the United States District Court for the Southern District of New York; Chief Judge Bolitha J. Laws, of the United States District Court for the District of Columbia; and many more.

The outstanding professional events demonstrated again the value of the regional meetings. Interest at Denver was enhanced by the fact that the Tenth Circuit federal judges held their annual conference in conjunction with the regional meeting. The judicial conference was under the chairmanship of Chief Judge Sam G. Bratton. Edward G. Knowles and Thomas M. Burgess were co-chairmen of the regional meeting and received countless accolades for the splendid program and arrangements.

Chairman Ed Knowles' exceptional talent as a vocalist and Richard Schmidt's dramatic skill also were revealed at the regional banquet presentation of a folk opera, "A Critique of the Jealous Mistress". It was staged with professional aplomb by a talented group of members of the Denver Bar Association. The banquet was the social highlight of the three-day regional meeting. Featured also were informal and delightful remarks by Judge Alfred P. Murrah, of the United States Court of Appeals for the Tenth Circuit.

# Review of Recent Supreme Court Decisions

George Roseman
EDITOR-in-CHARGE

**Aliens . . .**
***deportation of parents of minor citizen***

*United States* ex rel. *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 1 L. ed. 2d 652, 77 S. Ct. 618, 25 U.S. Law Week 4201. (No. 205, decided March 25, 1957.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

The question here was whether the Board of Immigration Appeals had abused its discretion in denying the application for a suspension of deportation filed by the alien parents of a five-year-old American citizen.

The petitioners, a Greek couple, both entered the United States as members of the crew of a ship. The woman was pregnant and decided to stay ashore in the interest of her health. Her husband joined her later. Both failed to leave after the expiration of their limited lawful stays. Meanwhile their child was born, and is, of course, an American citizen by birth.

Deportation proceedings were instituted when petitioners voluntarily disclosed their illegal presence in the country and applied for suspension of deportation. The Hearing Officer found that they were eligible for relief, but denied their request, largely on the ground that they had formed no roots or ties in this country. The Board of Immigration Appeals upheld the Hearing Officer's recommendation. It was a matter of administrative discretion, said the Board, and it held that the facts and circumstances did not warrant a granting of the maximum relief. The Board was influenced in its decision by the congressional policy expressed in the Immigration Act of 1952, a statute concededly not applicable to this case.

Reviews in this issue by Rowland Young.

The petitioners brought this suit for habeas corpus, which was denied by the District Court and the denial was affirmed by the Court of Appeals.

Mr. Justice HARLAN delivered the opinion of the Supreme Court affirming. The Court took the view that, while the petitioners met the statutory requirements for suspension of deportation, "the statute does not contemplate that all aliens who meet the minimum legal standards will be granted suspension. Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisites have been met". The Court saw no reason why the 1952 Act should not have been considered by the immigration authorities in exercising their discretion as an expression of "present day conditions and congressional attitudes".

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS wrote a dissenting opinion in which Mr. Justice BLACK joined. The dissent argued that deportation of the parents would "result in serious detriment to a citizen", that is, the couple's son, and thus was counter to the policy of the Immigration Act of 1917. The dissent objected to the Board's use of the admittedly inapplicable 1952 Immigration Act, saying that prevailing congressional policy did not affect the standards prescribed for administrative action under the 1917 act.

The case was argued by Jay Nicholas Long for petitioner and by Maurice A. Roberts for respondent.

**Aliens . . .**
***eligibility for citizenship***

*Ceballos* v. *Shaughnessy*, 352 U.S. 599, 1 L. ed. 2d 583, 77 S. Ct. 545, 25 U.S. Law Week 4187. (No. 71, decided March 11, 1957.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

In this case, an alien resident in the United States sought a declaratory judgment against the District Director of Immigration declaring that he was eligible for suspension of deportation and restraining the Director from taking him into custody for deportation. The District Court dismissed the complaint on the ground that either the Attorney General or the Commissioner of Immigration were indispensable parties. The Court of Appeals affirmed on that ground and also on the ground that petitioner was ineligible for citizenship because, as the citizen of a neutral country, he had applied under the Selective Training and Service Act for relief from service in the Armed Forces. Under the Selective Training and Service Act, a neutral alien making such an application "shall thereafter be debarred from becoming a citizen of the United States".

Mr. Justice BRENNAN spoke for a unanimous Supreme Court. The Court held that the Attorney General and the Commissioner were not indispensable parties, citing *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 99 L. ed. 868, 75 S. Ct. 591 (1955), which held that determination of the indispensability of parties in deportation suits depends upon the ability and the authority of the defendant before the court to effectuate the relief sought. Since the District Director here was the official that would execute the deportation, the Court declared that he was a sufficient party.

The Court affirmed the judgments below, however, on the ground that the alien's application for relief

from military service made him ineligible for citizenship. He had filed the application on August 26, 1943, while Colombia, his native country, was still a neutral. The Selective Service Board had failed to classify him as a neutral however, and on January 27, 1944, after Colombia had become a co-belligerent, the board notified him that he was classified I-A. He reported for physical examination but was rejected as physically unfit for military service. The Court rejected the argument that the alien was not debarred from citizenship until after the local board had affirmatively granted him relief from service and given him notice of its action. The Court noted that he voluntarily executed and filed the application for relief from service and allowed it to remain on file. "The explicit terms of the section debar the neutral alien 'who makes such application' for immunity from military service" the Court said. The Court also rejected an argument that the 1952 Immigration and Nationality Act, rather than the Selective Service and Training Act, governed the case.

The case was argued by Sidney Kansas for the petitioner and by Oscar H. Davis for the respondent.

## Constitutional law . . . *right to counsel*

*In re Grobnan's Petition,* 352 U.S. 330, 1 L. ed. 2d 376, 77 S. Ct. 510, 25 U.S. Law Week 4166. (No. 14, decided February 25, 1957.) *On appeal from the Supreme Court of the State of Ohio. Affirmed.*

The question presented here was whether the appellants had a constitutional right to the assistance of counsel when they appeared as witnesses at a proceeding conducted by the Ohio State Fire Marshal to investigate the causes of a fire.

The appellants were the owners and operators of a corporation on whose premises the fire occurred. In his investigation, the Fire Marshal refused to permit the appellants to bring their counsel, relying on an Ohio statute that provides such an investigation "may be private". They declined to be sworn or to testify without the presence of their counsel and the Marshal committed them to the county jail for contempt. Their petition for habeas corpus was denied, and both the Ohio Court of Appeals and Supreme Court affirmed. Before the Supreme Court of the United States, appellants contended that the Fire Marshal's authority to exclude counsel was unconstitutional because the due process clause granted them the right to the assistance of counsel.

Mr. Justice REED delivered the opinion of the Supreme Court affirming. The Court found the situation analogous to that of a witness before a grand jury, where there is no constitutional right to the assistance of counsel. The Court pointed out that the Fire Marshal's investigation was not a criminal proceeding nor would it adjudicate the appellants' responsibility for the fire. The Court also gave weight to the argument that the presence of advisers to witnesses might encumber the investigation so as to make it unworkable or unwieldly.

Mr. Justice FRANKFURTER, joined by Mr. Justice HARLAN, wrote a concurring opinion which stressed the fact that the Fire Marshal was an investigative, not a prosecuting officer.

Mr. Justice BLACK, joined by the CHIEF JUSTICE, Mr. Justice DOUGLAS and Mr. Justice BRENNAN, wrote a strong dissent which outlined the broad powers of the Fire Marshal in an investigation and the paucity of methods of defense by the witness against an arbitrary action. The dissent argued that the Court's analogy to a grand jury investigation was misleading, and pointed out the difference in the method of selecting a grand jury and the fact that the grand jury is not a prosecuting agency or a law-enforcement officer ferreting out crime.

The case was argued by James F. Graham for appellants and by Earl W. Allison, Jr., and J. Ralston Werum for the appellee.

## Criminal law . . . *informer's privilege*

*Roviaro* v. *United States,* 353 U.S. 53, 1 L. ed. 2d 639, 77 S. Ct. 623, 25 U.S. Law Week 4204. (No. 58, decided March 25, 1957.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Reversed and remanded.*

This case dealt with a conviction for violation of the Narcotic Drugs Import and Export Act. The Supreme Court overturned the conviction because of the Government's refusal at the trial to disclose the identity of an informer who had taken a material part in the events leading up to the petitioner's arrest.

The informer, referred to as John Doe, arranged to have a police officer secreted in the trunk of his automobile when he met the petitioner allegedly for a purchase of narcotics. Other police officers followed the informer's car, and one of them later testified that Doe met the petitioner, drove him several blocks and then stopped to pick up a small package, which was later found to contain heroin. The police officer in the trunk testified as to the conversation of Doe and the petitioner during the drive. The Government refused to disclose the identity of John Doe either before or during the trial. The trial ended in a conviction which was affirmed by the Court of Appeals.

Mr. Justice BURTON, speaking for the Supreme Court, held that under the circumstances, it was reversible error for the trial court to allow the Government to keep the informer's identity secret. The Court pointed out that the informer was the sole participant with the accused in the transaction charged, and was the only witness in a position to amplify or contradict the testimony of the police officers. "Contradiction or amplification might have borne upon petitioner's knowledge of the contents of the package or might have tended to show an entrapment" the Court said. The Court stated that no fixed rule with respect to disclosure of the identity of informers was justifiable, but it ordered a new trial

in this case because the evidence at the trial was so closely related to the informer that his identity and testimony were highly material.

Mr. Justice BLACK and Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice CLARK wrote a dissenting opinion which argued that the record made it plain that the identity of the informer was well known to the defendant and that the petitioner had failed to show how he was harmed by the nondisclosure of the informer's identity.

The case was argued by Maurice J. Walsh for petitioner and by James W. Knapp for respondent.

### Elections . . . *contributions by labor unions*

*United States* v. *International Union,* 352 U.S. 567, 1 L. ed. 2d 563, 77 S. Ct. 529, 25 U.S. Law Week 4189. (No. 44, decided March 11, 1957.) *On appeal from the United States District Court for the Eastern District of Michigan. Reversed and remanded.*

The ultimate issue in this case was the perplexing problem of legislative efforts to control the use of wealth to buy political power. The U.A.W. was indicted for violations of the Corrupt Practices Act, 18 U.S.C. §610, which prohibits corporations and labor unions from making "a contribution or expenditure in connection with" any election for federal office. It was alleged that the union paid for certain television broadcasts during the 1954 elections urging the electorate to select certain congressional candidates. The District Court dismissed the indictment on the ground that the statute did not apply to the activities alleged.

On direct appeal to the Supreme Court, Mr. Justice FRANKFURTER delivered the Court's opinion reversing and remanding. The Court ruled that the trial judge erred in holding that the activity complained of did not fall within the ban of the statute, but refused to pass on the constitutional questions raised and remanded the cause for trial saying that "only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision". The Court's opinion contains a lengthy essay on the problem of the use of wealth to influence elections. The Court's extensive examination of the legislative background of the Corrupt Practices Act convinces it that the activities complained of here were precisely the kind of contribution that Congress intended to prohibit in the statute.

Mr. Justice DOUGLAS wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice BLACK joined. The dissent insisted that the statute was a curtailment of the union's freedom of speech, protected by the First Amendment, and it argued that the statute could not possibly be construed narrowly enough to make it valid.

The case was argued by Solicitor General J. Lee Rankin for the United States and by Joseph L. Rauh, Jr., for the unions.

### Insurance . . . *presumption of death*

*Peak* v. *United States,* 353 U.S. 43, 1 L. ed. 2d 631, 77 S. Ct. 613, 25 U.S. Law Week 4209. (No. 491, decided March 25, 1957.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Reversed and remanded.*

The petitioner in this case was suing to recover the proceeds of a National Service Life Insurance Policy issued to a soldier who disappeared from his Army unit in 1943 and who was therefore presumed to be dead at the end of seven years. The Government contended that the policy had lapsed for failure to pay premiums long before 1950, or, in the alternative, if the insured was presumed to have died in 1943, that the claim was barred by the six-year statute of limitations.

The petitioner alleged that, at the time of his disappearance, the insured was in a condition of "general debility and weakness and despondency" and had become "permanently and totally disabled". It was also alleged that the insured died in 1943 and that his disability entitled him to waiver of premiums on the policy.

The District Court dismissed the complaint on the ground that the insured was presumed to have died as of 1950 and that the policy had lapsed in the interim. The Court of Appeals affirmed.

Mr. Justice DOUGLAS, speaking for the Supreme Court, reversed and remanded, ruling that the petitioner was entitled to go to the jury with her case. The Court reasoned that as a practical matter petitioner could not begin suit until the expiration of the seven-year presumption-of-death period had expired, and that the statute of limitations began to run as of that date—that is, 1950. At the same time, the Court said, nothing precluded her from introducing evidence from which a jury might conclude that the insured's death occurred at an earlier date than 1950 when the policy was still in force. The Court added that the allegations of permanent and total disability would be sufficient to bring petitioner within the premium waiver provisions even if the jury found that the date of death was later than 1943.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice HARLAN, joined by Mr. Justice FRANKFURTER and Mr. Justice BURTON, wrote an opinion concurring in part and dissenting in part. This opinion took the position that if the petitioner could prove that the policy was still in force in 1950, the date when death was presumed, she was entitled to recover and should be allowed to attempt such proof. The opinion disagreed however that the petitioner could recover if the death occurred in 1943, since the statute of limitations would have run. Petitioner could not rely upon a presumption of death in 1950 for purposes of the statute of limitations and proof of death in 1943 for purposes of avoid-

ing the problem of a lapsed policy, the opinion stated.

The case was argued by John S. Wrinkle for the petitioner and by George S. Leonard for the respondent.

## Labor law . . . *no-strike clauses*

*National Labor Relations Board* v. *Lion Oil Company and Monsanto Chemical Company,* 352 U. S. 282, 1 L. ed. 2d 331, 77 S. Ct. 330, 25 U. S. Law Week 4098. (No. 4, decided January 22, 1957.) *On writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Reversed and remanded.*

The question before the Court in this case was the interpretation of Section 8 (d) (4) of the National Labor Relations Act as amended, which provides that a party that wishes to modify or terminate a collective bargaining agreement must "continue . . . in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after notice [of his wish to modify or terminate] is given or until the expiration date of such contract, whichever occurs later".

The agreement in this case, dated October 23, 1950, between the Oil Workers International Union and the Lion Oil Company, provided that it should continue in effect for a year "and thereafter until canceled", and contained a provision for opening negotiations for modication after August 24, 1951. Other clauses provided that notice of a desire for modication should be followed by sixty days during which "the Company and the Union shall attempt to agree" and further, if no agreement was reached within the sixty-day period, either party could terminate the contract, upon written notice, at the end of another sixty days.

On August 24, 1951, the union served notice on the company that it wanted to modify the contract. Negotiations began, but no agreement was reached and on February 14, 1952, the union voted to strike, but the strike was postponed and finally began April 30. The union never gave notice of a desire to terminate the contract, which therefore continued in force until the new contract was signed August 3, 1952. The union contended that certain actions of the Company during the strike were unfair labor practices and filed charges with the N.L.R.B. The company defended on the ground that since the strike occurred while the contract was still in force, it was a violation of Section 8 (d) (4). The Board found the company guilty, but the Court of Appeals set aside its order.

The Supreme Court, speaking through the CHIEF JUSTICE, reversed and remanded. The Court said that, while a "narrow literal construction" of the statutory language might support the company's position, the section had to be read in the context of the whole statute. Taken from this point of view, the Court said that it could not equate the phrase "expiration date" only with the date when a contract comes to an end, and it concluded that Congress intended "expiration date" to mean either date of notice of termination or notice of a desire to modify the contract. The statute was therefore fully satisfied, the Court held, since October 23, 1951, was by the terms of the contract itself the first date upon which it was subject to amendment, and the strike did not occur until long afterward.

The Court also dismissed the company's alternative argument that even apart from Section 8 (d), the strike was a breach of contract and the strikers were therefore not entitled to relief from the Board. The Court distinguished *Labor Board* v. *Sands Manufacturing Co.,* 306 U. S. 332.

Mr. Justice BRENNAN took no part in the consideration or decision of the case.

Mr. Justice HARLAN wrote an opinion concurring in the Court's opinion insofar as it related to construction of Section 8 (d), but dissenting from the part of the opinion that dismissed the company's breach of contract defense since that point had not been considered by the Court of Appeals.

Mr. Justice FRANKFURTER also wrote an opinion in which he concurred with the Court's construction of Section 8 (d), but dissented on the ground that the Court should not have passed upon the company's breach of contract defense. The language of the statute was ambiguous, the opinion declared, as was indicated by the fact that the five Board members and three circuit judges who considered it below had arrived at four distinct interpretations.

The case was argued by Theophil C. Kammholz for the petitioner and by Jeff Davis for respondent.

## Labor law . . . *union shop*

*Pennsylvania Railroad* v. *Rychlik,* 352 U.S. 480, 1 L. ed. 2d 480, 77 S. Ct. 421, 25 U.S. Law Week 4138. (No. 56, decided February 25, 1957.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed and remanded.*

The Railway Labor Act permits establishment within the industry of union shop contracts and provides that the requirements of union shop under any such contract is satisfied if the employee belongs to "any one of the labor organizations, national in scope, organized in accordance with this act". The precise meaning of that language was the issue in this case.

Rychlik was a member in good standing of the Brotherhood of Railroad Trainmen until February, 1953, when he resigned and joined the United Railroad Operating Crafts (UROC), a competing union which he believed to be "national in scope" and "organized in accordance with" the act, even though UROC had never qualified itself under Section 3, First, of the act as a union eligible to elect labor members of the National Railroad Adjustment Board. Rychlik was charged with violation of the union-shop agreement

and received two hearings before a System Board of Adjustment, a body established under the agreement to settle contract disputes. The Board determined that UROC membership did not satisfy the union-shop proviso. Rychlik was thereupon discharged for failure to maintain continuous union membership. He brought this suit for an injunction compelling the railroad and the Brotherhood to accept him as an employee and member of the union. The District Court dismissed for lack of jurisdiction, but the Court of Appeals reversed and remanded for a hearing on the merits of the System Board's decision that membership in UROC did not satisfy the act.

Mr. Justice HARLAN delivered the opinion of the Supreme Court reversing and remanding. The Court ruled that, despite the literal meaning of the words "any one of the labor organizations, national in scope, organized in accordance with this act", the legislative background of the statute showed that Congress intended to allow alternative union membership only in those unions already qualified under Section 3, First, of the act, for the purpose of electing the union members of the NRAB. The purpose of the provision, the Court said, was to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changed his crafts. The provision was necessary because the railroad worker unions are craft unions rather than industrial unions, and the high degree of job mobility in the industry creates much shuttling back and forth of individual employees in the industry. It was not the intention of Congress, the Court found, to provide employees with a general right to join unions other than the designated bargaining representative of their craft except to meet the problem of intercraft mobility. Since UROC had not qualified under Section 3, First, Rychlik had not stated a claim on which relief could be granted.

Mr. Justice BLACK took no part in the consideration or decision of the case.

In a concurring opinion, Mr. Justice FRANKFURTER took the position that the District Court had no jurisdiction of the case since the Railway Labor Act, in his view, left the problem in the exclusive hands of the System Board, subject to judicial review only in cases of alleged arbitrariness.

The case was argued by Richard N. Clattenburg for the Pennsylvania Railroad, by Henry Kaiser for the Brotherhood of Railroad Trainmen, and by Norman M. Spindelman and Meyer Fix for the respondent.

## Labor law . . . "*no man's land*"

*Guss* v. *Utah Labor Relations Board,* 353 U.S. 1, 1 L. ed. 2d 601, 77 S. Ct. 598, 25 U.S. Law Week 4212. (No. 280, decided March 25, 1957.) *On appeal from the Supreme Court of Utah. Reversed.*

In this case, and in Nos. 41 and 50, *infra,* the Supreme Court dealt with the question of the authority of state agencies or state courts to act in labor disputes which are within the jurisdiction of the National Labor Relations Board but over which the Board has declined to exercise its jurisdiction. The Court held that the states have no power to act in such cases, even though the result is a "no man's land", subject to regulation by no agency or court.

Appellant manufactures specialized photographic equipment for the Air Force on a contract basis, doing business in Salt Lake City. He purchased "a little less than $50,000" worth of materials from outside Utah to fulfill the contract. In 1953, the United Steel Workers filed with the N.L.R.B. a petition for certification of the union as the bargaining representative of appellant's employees. The union was duly elected as the bargaining representative and was certified as such by the Board. Shortly thereafter, the union filed unfair labor practice charges with the Board, which had meanwhile promulgated revised jurisdictional standards. On July 21, 1954, the Board declined to issue a complaint on the ground that the operations of the Company were predominantly local in character and that it would not effectuate the policies of the Act to exercise jurisdiction.

The union thereupon filed similar charges with the state board, under the Utah Labor Relations Act. The state board found that it had jurisdiction and entered an order granting the union relief. The Supreme Court of Utah affirmed on a writ of review.

The Supreme Court of the United States reversed, speaking through the CHIEF JUSTICE. The Court relied upon Section 10(a) of the National Labor Relations Act, which empowers the N.L.R.B. "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce". By this language, the Court reasoned, Congress clearly intended to reach to the full extent of its power under the commerce clause. A further proviso of Section 10(a), added by the Taft-Hartley Act, empowering the Board to cede jurisdiction to the states by agreement, the Court said showed the Congress intended such agreements to be the exclusive means by which the states might be enabled to act on matters entrusted to the N.L.R.B. "We believe . . . that Congress has expressed its judgment in favor of uniformity," the Court declared. "Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land."

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice BURTON wrote a dissenting opinion in which Mr. Justice CLARK joined (see *infra*).

The case was argued by Peter W. Billings for appellant and by E. R. Callister, Jr., for appellee.

*Amalgamated Meat Cutters and Butcher Workmen of North America* v. *Fairlawn Meats, Inc.,* 353 U.S. 20, 1 L. ed. 2d 613, 77 S. Ct. 604, 25 U.S. Law Week 4215. (No. 41, de-

cided March 25, 1957.) *On writ of certiorari to the Supreme Court of Ohio. Judgment vacated and cause remanded.*

This was a companion case to No. 280, *supra,* and presented the same ultimate question—*i.e.,* the authority of a state to act in a field over which the N.L.R.B. has jurisdiction which it has declined to exercise.

Respondent operates three meat markets in Akron. All its sales are intrastate, but of its total annual purchases amounting to $900,000, slightly more than $100,000 worth are purchased out of state. The union attempted to organize the plant, and, when it was refused, it picketed the respondent's stores and put secondary pressure on its suppliers. The Court of Common Pleas enjoined the picketing, the trespass upon the premises of the respondent and the use of secondary pressure on the suppliers. The union objected that the N.L.R.B. had exclusive jurisdiction. The Ohio Court of Appeals found that respondent's business was purely local and that the picketing was unlawful under Ohio policy. The state supreme court dismissed an appeal.

The Supreme Court vacated the judgment and remanded, again speaking through the CHIEF JUSTICE. The Court treated the case as one in which the N.L.R.B. would have declined jurisdiction and ruled that the decision was controlled by the *Guss* holding, *supra.* If the National Labor Relations Act operates to exclude state labor boards, the Court declared, it must also exclude state courts. In answer to the argument that the states should be permitted to act within the area of N.L.R.B. jurisdiction when the National Board has elected not to act, at least when the state action is consistent with federal policy, the Court replied that Congress had left it to the National Board to decide how consistent with federal policy state law must be. "Congress has expressed its judgment in favor of uniformity" the Court repeated.

The Court remanded the case because the Ohio court had enjoined trespass on respondent's premises. "Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here" the Court said, and it returned the cause to the Ohio Court of Appeals for proceedings not inconsistent with its opinion.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

For the dissenting opinion of Mr. Justice BURTON and Mr. Justice CLARK, see *infra.*

The case was argued by Mozart G. Ratner for petitioners and by Stanley Denlinger for respondent.

*San Diego Building Trades Council* v. *Garmon,* 353 U.S. 26, 1 L. ed. 2d 618, 77 S. Ct. 607, 25 U.S. Law Week 4216. (No. 50, decided March 25, 1957.) *On writ of certiorari to the Supreme Court of California. Judgment vacated and cause remanded.*

The issue here was similar to that in Nos. 280 and 41, *supra.*

Respondents operate two retail lumber yards in San Diego, purchasing more than $250,000 worth of material annually from outside of California. The union asked them to sign a contract containing a union shop provision. The respondents refused on the ground that it would be a violation of the National Labor Relations Act to sign such a contract before a majority of their employees had selected the union as bargaining agent. The union began peaceful picketing. The respondents filed suit in a California court seeking an injunction and damages; at the same time they filed a petition with the N.L.R.B. asking that the question of representation of its employees be solved. The Board dismissed the petition. The Superior Court granted an injunction and awarded respondents $1000 damages, a judgment that was affirmed by the state supreme court.

Again speaking through the CHIEF JUSTICE, the United States Supreme Court vacated the judgment and remanded, citing the *Guss* case as controlling.

The Court did not reach the question of damages, saying that it was in doubt whether the California court felt bound to "apply" the federal law on this point, under the mistaken notion that *United Construction Workers* v. *Laburnum* required such an award. *Laburnum* sustained an award of damages under state tort law for violent conduct. Whether the California law allowed such an award was a California question, the Court declared.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

For the dissenting opinion of Mr. Justice BURTON and Mr. Justice CLARK, see *infra.*

The case was argued by Charles P. Scully for petitioners and by James W. Archer for respondents.

*Guss* v. *Utah Labor Relations Board, Amalgamated Meat Cutters and Butcher Workmen of North America* v. *Fairlawn Meats, Inc., San Diego Building Trades Council* v. *Garmon,* 353 U.S. 12, 1 L. ed. 2d 608, 77 S. Ct. 609, 25 U.S. Law Week 4217. (Nos. 280, 41 and 50, decided March 25, 1957.)

Mr. Justice BURTON wrote a dissenting opinion in these cases in which Mr. Justice CLARK joined. The dissent took the view that, while the National Labor Relations Board had jurisdiction over the cases, nothing in the Act required the Board to exercise its jurisdiction and meanwhile the states have the necessary power to act so long as the federal power lies dormant and unexercised. The dissent declared that it was hard to believe that Congress, *"sub silentio,* intended to take such a step backward in the field of labor relations" as creating a no-man's-land over which neither the states nor the Federal Government exercised any supervision. The dissent read the Taft-Hartley amendment clause of Section 10 (a) merely as permissive—it was not intended, in this view, to wipe out the power of the states in cases where the Board declined to act.

**Labor law . . .**
***strike during mediation***

*Brotherhood of Railroad Trainmen* v. *Chicago R. and I. Railroad Company*, 353 U.S. 30, 1 L. ed. 2d 622, 77 S. Ct. 635, 25 U.S. Law Week 4220. (No. 313, decided March 25, 1957.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Affirmed.*

The question presented here was whether a railway labor organization can resort to a strike over matters pending before the National Railroad Adjustment Board. The Supreme Court held that such a strike could be enjoined by the courts.

The disagreement between the union and the railroad here was over an accumulation of twenty-one grievances of union members, admittedly "minor disputes" as the phrase is used in the Railway Labor Act. There were nineteen claims for additional compensation and two claims for reinstatement. Negotiations failed, and the Brotherhood called a strike. Because of the serious nature of the impending work stoppage, the National Mediation Board proffered its services, but was unsuccessful. The railroad then submitted the controversy to the Railroad Adjustment Board. The Brotherhood issued a strike call four days later. The railroad sought an injunction from the District Court, which denied it on the ground that the Court lacked jurisdiction under the Norris-LaGuardia Act to restrain the strike. The Seventh Circuit reversed and an injunction issued.

The opinion of the Supreme Court was delivered by the CHIEF JUSTICE. The Court turned to the language of the Railway Labor Act, pointing out that disputes in the industry are to be settled by negotiation and conference between the parties, under the statute, and if the parties are unable to agree, then either party may submit the dispute to the National Railroad Adjustment Board, whose awards are to be "final and binding upon both parties to the dispute". The Brotherhood's contention that this language merely meant that the parties were free to make use of the services of the Board if they so wished would render the terms of the statute meaningless, the Court declared. The Court found that its view of the act was buttressed by the legislative history.

The Court also held that the Norris-LaGuardia Act could not be read by itself on the question whether the courts could enjoin a strike on a matter pending before the Board. The purposes of the two acts are reconcilable, said the Court, the Norris-LaGuardia Act being a broad statute in general terms designed to protect working men in the exercise of their economic power in collective bargaining, whereas the Railway Labor Act deals specifically with one industry and sets up special processes to compromise controversies in that industry.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

The case was argued by William C. Wines for petitioners and by Walter J. Cummings, Jr., for respondents.

**Labor law . . .**
***temporary lockout***

*National Labor Relations Board* v. *Truck Drivers Local Union*, 353 U.S. 87, 1 L. ed. 2d 676, 77 S. Ct. 643, 25 U.S. Law Week 4225. (No. 103, decided April 1, 1957.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed.*

Members of an employers' bargaining association did not commit an unfair labor practice when, during negotiations for a new contract with the union, they temporarily locked out their employees as a defense against a union strike called against one of their members.

The employers were eight firms engaged in the linen supply business in and around Buffalo. During negotiations for a new contract with the union, the union put into effect a so-called "whipsawing plan", a process of striking one at a time the members of a multi-employer association. When the first plant was struck the remaining seven members of the association laid off their truck drivers, notifying the union that the laid-off drivers would be recalled if the union withdrew its picket line and ended the strike. Negotiations were continued, and a week later a new agreement was signed, the strike ended, and the laid-off employees were recalled.

The union filed a charge with the National Labor Relations Board that the temporary lockout was an unfair labor practice. Although the trial examiner found the employers guilty, the Board reversed him, calling the employers' action "defensive and privileged in nature, rather than retaliatory and unlawful", reasoning that the strike against one employer carried with it an implicit threat of future strike action against the others. The Court of Appeals reversed, holding that a lockout could be justified only if there were facts showing unusual economic hardship.

The Supreme Court reversed in an opinion delivered by Mr. Justice BRENNAN. The Court made it plain that it was deciding a narrow question—whether a temporary lockout is lawful as a defense to a union strike tactic that threatens the destruction of the employers' interest in bargaining on a group basis. The Court declared that there was nothing in the Wagner Act outlawing strikes or lockouts as such, and it cited the use of the word "lockout" in the Taft-Hartley Act as statutory recognition that there are circumstances in which employers may lawfully resort to lockouts as an economic weapon. Preservation of the integrity of the multi-employer bargaining unit was one such case, the Court declared.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

The case was argued by Dominick L. Manoli for the petitioner and by Thomas P. McMahon for respondent.

**Patents . . .**
***antitrust decree***

*United States Gypsum Company* v. *National Gypsum Company*, 352

U. S. 457, 1 L. ed. 2d 465, 77 S. Ct. 490, 25 U. S. Law Week 4132. (No. 11, decided February 25, 1957.) *On appeal from the United States District Court for the District of Columbia. Reversed and remanded.*

This was an appeal from a decree of a three-judge district court denying damages for the *pendente lite* use of certain United Gypsum patents from February 1, 1948, to May 15, 1951.

The case grew out of a prolonged antitrust action in which Gypsum and other defendants were charged with conspiracy to monopolize interstate commerce in gypsum board and other gypsum products by the use of industry-wide uniform patent licensing agreements containing clauses that gave Gypsum the right to fix resale prices. The Sherman Act suit ended in a judgment which declared Gypsum's patent licensing arrangements to be illegal, null and void, enjoined their performance, provided for limited compulsory non-exclusive licensing of the patents on a reasonable royalty basis, and reserved jurisdiction over the parties for certain purposes. Both sides appealed to the Supreme Court, which held the Government entitled to broader relief and remanded the case for that purpose.

The present defendants ceased to pay royalties under their old licensing agreements pending the outcome of the litigation, and this suit was brought by Gypsum to recover the royalties for the three-year period. Gypsum asserted three grounds for recovery: (1) the royalty provisions of the old license agreements, (2) *quantum meruit*, and (3) damages for patent infringement. The District Court held that the first ground was untenable under the terms of the antitrust decree and further that Gypsum's suits should be prohibited because of its unpurged misuse of its patents.

The Supreme Court agreed with the District Court as to the first ground, but reversed and remanded as to the *quantum meruit* and patent infringement counts. The Court's opinion was written by Mr. Justice HARLAN. The District Court had denied relief on the latter counts, first because Gypsum had engaged in "fresh" patent abuse, second because the "old" misuse, adjudicated in the antitrust proceeding, remained unpurged, and third, because, irrespective of purge, the "old" misuse itself was sufficient to bar the patent infringement count. The Court took up these points one at a time.

The "fresh" misuse found by the District Court was the inclusion in the present action of prayers for the recovery of royalties under the illegal licensing agreements. The District Court viewed this as a renewed attempt to enforce the illegal licensing agreements and a new misuse of the patents. The Supreme Court however read the pleading as merely an alternative legal theory upon which Gypsum was basing its case, possibly introduced as a means of fending off use of the license agreements as a defense on the *quantum meruit* and infringement pleadings.

The Court refused to find an "old misuse" that continued unpurged through 1948-1951, saying that the only *adjudicated* misuse was that arising from the uniform price fixing provisions of the old license agreements and that the record was barren of any facts relating to the 1948-1951 period. Gypsum was entitled to its day in court on the question of the competitive conditions in the gypsum industry during the critical period, the Court ruled.

To the third of the District Court's reasons for denying relief, namely that, regardless of purge, the "old" misuse barred recovery for the infringement, the Court said that the Government had not sought or obtained any injunction prohibiting suit for infringement, although early in the earlier antitrust litigation such a prayer had been included and later abandoned. There was no proof that such an injunction was necessary in the public interest and, absent such proof, proscription of the infringement suit "amounted to the imposition of an unwarranted penalty", the Court decided.

Mr. Justice CLARK took no part in the consideration or decision of the case.

Mr. Justice BLACK, joined by the CHIEF JUSTICE and Mr. Justice DOUGLAS, wrote a dissenting opinion. The dissent argued that Gypsum was "giving its lawsuits suitable labels", like *quantum meruit* and *indebitatus assumpsit*, designed to obtain "compensation for the use of tools it supplied to violate the law". Allowing Gypsum to maintain its suit, the dissent argued, ran counter to the doctrine of clean hands, under which the law leaves wrongdoers where it finds them.

The case was argued by Bruce Bromley for appellant and by Samuel I. Rosenman and Norman A. Miller for the appellees.

### Trade regulation . . . *zone pricing systems*

*Federal Trade Commission* v. *National Lead Company*, 352 U. S. 419, 1 L ed. 2d 438, 77 S. Ct. 502, 25 U. S. Law Week 4144. (No. 63, decided February 25, 1957.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Reversed.*

This case presented a challenge to the Federal Trade Commission's power to order individual respondents to cease and desist from using zone pricing systems that have the effect of "matching" the prices of competitors. The respondents asserted that this was beyond the power of the Commission, and the Court of Appeals agreed.

In 1944, the Commission began proceedings against the respondents, who represented "practically the entire economic power in the industry", and, after protracted hearings, found that they had conspired to adopt and use a zone delivered pricing system in their sale of lead pigments. The cease and desist order forbade a concert of action in the further use of such a system and further ordered respondents as individuals to cease and desist from the use of zone pricing systems. The Court of Appeals ordered the latter provision stricken from the order.

The Supreme Court reversed, speaking through Mr. Justice CLARK. The Court viewed the challenged portion of the order as a temporary provision, by which the Commission hoped to create "a breathing spell during which independent pricing might be established without the hang-over of the long-existing pattern of collusion". The order was directed solely at the use of a zone delivered pricing system and no other, the Court noted, and then only when two conditions were present: (1) identical prices with competitors (2) resulting from zone delivered pricing. The Court conceded that non-collusive, individual use of zone pricing was a lawful, competitive sales method, but it refused to hold that it was beyond the power of the Commission to forbid its use by the respondents under these circumstances. The test, said the Court, was whether the remedy the Commission selected to carry out its responsibilities was reasonably related to the unlawful practices. In concluding that it was, the Court declared that the respondents could not be permitted "to continue to use individually the very same weapon with which they carried on their unlawful enterprise". The Court added that the order did not prohibit or interfere with independent delivered zone pricing *per se* and that the provision of Section 2 (b) of the Clayton Act, relating to the right of a seller in good faith to meet the lower price of a competitor, was to be read into the order.

The case was argued by Earl W. Kintner for petitioner and by Eugene Z. DuBose for respondents.

## Veterans . . . *Soldiers' and Sailors' Civil Relief Act*

*United States* v. *Plesha,* 352 U.S. 202, 1 L. ed. 2d 254, 77 S. Ct. 275, 25 U.S. Law Week 4088. (No. 39, decided January 14, 1957.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Affirmed.*

The Court here rejected the Government's contention that it should be reimbursed by three veterans for back premiums on commercial insurance policies kept in effect during World War II under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940. The veterans had allowed the policies to lapse and the Government paid the insuring companies the back premiums due after deducting the cash surrender value of the policies.

Under the statute, men inducted into the Armed Forces continued to receive the protection of commercial life insurance policies without paying premiums. The insurance companies were required to keep the policies in force while the men were in service and the Government gave its promissory certificates to the companies guaranteeing that the premiums would eventually be paid. In this case, the veterans allowed the policies to lapse after their return to civilian life. The District Court agreed that the Government had a right to be reimbursed for the payments it made. The Court of Appeals reversed.

The judgment of the Court of Appeals was affirmed by Mr. Justice BLACK, speaking for the Supreme Court. The Court pointed out that the statute contained no express provision requiring reimbursement of premiums paid by the Government, but "significantly it did contain specific provisions to reduce any losses the Government might incur in administering the insurance plan . . .", such as its lien upon the policy and its right to the cash surrender value of the policy as an offset against its promise to pay the back premiums. The 1940 act was substantially a re-enactment of the Soldiers' and Sailors' Civil Relief Act of 1918, and the Court determined that both the legislative history and the practice of the Veterans Administration in dealing with the statutes supported its view of the case. The Court viewed a 1942 amendment, requiring veterans to reimburse the Government for back premiums it paid on lapsed policies, as a change in the statute rather than as a clarification of the 1940 act.

Mr. Justice FRANKFURTER, Mr. Justice BURTON and Mr. Justice HARLAN noted their dissent "for the reasons given by Circuit Judge Huxman in *United States* v. *Hendler,* 225 F. 2d 106".

The case was argued by Lester S. Jayson for the United States and by Lawrence A. Schei for the respondents.

## New Members of the Supreme Court

*(Continued from page 527)*

tional, designed to arrest attention either to thought or phrase. His his work so far has followed the conventional conservative pattern. Upon the other hand his compositions are somehow made to reflect his extremely approachable and pleasing personality. His orderly treatment of the subject matter being considered, the grouping of premises leading to conclusions which seem inevitable, reveal the work of a legal technician.

Companionable by nature there would seem to be no room for doubt that co-operative effort and team work may be expected to characterize his relations with his colleagues on the Court.

JACOB MARK LASHLY

St. Louis, Missouri

# What's New in the Law

**The current product of courts, departments and agencies**

**George Rossman • EDITOR-IN-CHARGE**

**Richard B. Allen • ASSISTANT**

## Antitrust Laws . . . *boxing*

The International Boxing Club has been found guilty by the United States District Court for the Southern District of New York of violating the federal antitrust laws. The suit was a civil action brought by the United States under §4 of the Sherman Act (15 U.S.C.A. §4) to restrain and prevent violations of §§1 and 2 of the Act (15 U.S.C.A. §§ 1-2).

The charge was that the I.B.C. combined and conspired to monopolize interstate trade and foreign commerce in the promotion, exhibition, broadcasting, telecasting and motion picture production and distribution of professional championship fights. The allegations of the complaint, which the Court found proved at the trial, were that the I.B.C. accomplished its conspiracy and combination through purchasing promotional control of certain championships, through acquiring the assets of competitors, through acquiring the exclusive use of physical facilities for the presentation of fights and through contracts requiring fighters who won championships to engage in future title bouts exclusively for it for varying periods of years.

Since the charge of monopolization related only to championship fights, the defendant sought to invoke the "relevant market" rule of the Cellophane case—*U.S.* v. *Du Pont,* 351 U.S. 377—where the Supreme Court ruled that while Du Pont controlled Cellophane, the product was but a part of the flexible packaging materials market and that other products were reasonably interchangeable with Cellophane for the purpose for which it was produced.

But the Court rejected an analogous application of that doctrine. Championship professional prize fights, the Court declared, have such unique qualities that they "are on a plane which clearly distinguishes them from non-championship fights". The Court found that in public interest and financial return title bouts are quite distinct, and that the defendant itself, by limiting its exclusive contracts to future championship fights and by excluding such fights from its regular television contracts, recognized this.

The Court also turned down an argument that the I.B.C. was not engaged in interstate trade or commerce and thus not subject to the Sherman Act. It said that the Supreme Court's decision in *U.S.* v. *International Boxing Club,* 348 U.S. 236 (1955), coupled with its factual findings, decisively answered that contention. The Court also dismissed the defendant's fear that the case might open the way for "a broad attack upon all professional sports, except organized baseball". Obviously not impressed with the relationship of professional boxing to sports, the Court stated that "the promotion of professional championship boxing contests is a pure and simple money-making, profit-seeking business".

(*U.S.* v. *International Boxing Club,* United States District Court, Southern District of New York, March 8, 1957, Ryan, J.)

## Contempt . . . *congressional committee*

The Court of Appeals for the District of Columbia Circuit, with one judge dissenting, has held that a witness before a congressional subcommittee cannot invoke the Fifth Amendment to refuse to name persons who attended meetings of an "intellectual" Communist group, after having testified freely that he was himself a Communist and a member of the group.

The witness, testifying in 1953, stated that several years before, while a teacher at Harvard, he had been a member of the Communist Party and had attended meetings along with other Marxists at Harvard and the Massachusetts Institute of Technology. Implying that the group consisted of what might be termed "soft-core" Communists, he denied that the group was subversive; he said they were "intellectuals" and "scholars". But when asked whether nine persons, who had been named before the subcommittee as Communists, attended any of the meetings, the witness refused to answer, invoking the self-incrimination clause of the Fifth Amendment and claiming that his answer might subject him to a real danger of prosecution under the knowing association and affiliation provisions of the Smith Act, 18 U.S.C.A. §2385.

The Court rejected the witness' reliance on the Fifth Amendment, but at the same time set his fears of prosecution at rest. Taking the alternatives, the Court held that if the witness' answer to the question would be incriminating, then it would incriminate him no more than his previous voluntary answers linking him with the Communist group; if, on the other hand, the voluntary answers had not incriminated him, then the answer to the refused question would not have had that effect. Either way you sliced it, the Court concluded, the witness' reliance on the Fifth Amendment was not well-placed.

The dissenting judge wrote that

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**Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.**

by answering the question the witness would have been supplying a "link in the chain of evidence needed in a prosecution" under the Smith Act (quoting from *Blau* v. *U.S.*, 340 U.S. 159). He declared, moreover, that availability of the Fifth Amendment privilege extends to testimony that might be used to search out other testimony or evidence on which to base a prosecution.

(*Singer* v. *U.S.*, United States Court of Appeals, District of Columbia Circuit, April 18, 1957, Miller, J.)

### Corporation Law . . . *stockholders list*

The Supreme Court of Delaware has decided that the stockholders list required by the state's law to be available ten days before directors' elections must include the addresses as well as the names of stockholders.

The Delaware statute provides for the preparation "at least ten days before every election of directors, a complete list of stockholders entitled to vote at said election, arranged in alphabetical order". It further provides that the list shall be available for inspection by any stockholder.

Against a contention that the statute should be literally construed, the Court held that a "complete list" is a list containing addresses of stockholders. To the Court, this conclusion was buttressed by a consideration of the purposes of the list, one of which, it said, is to give a stockholder information from which he can intelligently exercise his vote. This a stockholder could not do, the Court went on, from a bare list of names if he were, for instance, interested in lining up other stockholders to vote his way. The Court felt, moreover, that a list without addresses would not be very helpful for officers and inspectors of election in ascertaining matters of quorum and voting rights.

In passing, the Court noted that it had been customary for several years for corporations to furnish addresses along with names and that the corporation involved in the instant case had such a roster for the use of its own management at the annual meeting.

(*Magill* v. *North American Refractories Company*, Supreme Court of Delaware, December 28, 1956, Southerland, C.J., 128 A. 2d 233.)

### Criminal Law . . . *information sufficiency*

An information charging one with unlawfully representing himself as authorized to practice law must state the act or acts constituting the representation, the Supreme Court of Illinois has ruled.

An Illinois statute makes it a misdemeanor for a person to "hold himself out as an attorney at law or solicitor in chancery or represent himself either verbally or in writing, directly or indirectly, as authorized to practice law. . . ." The information simply charged that the defendant "did then and there unlawfully, knowingly and wilfully represent himself as authorized to practice law . . . not then and there being regularly licensed to practice law. . . ."

The Court declared that when a statute clearly defines a criminal offense an information is sufficient if it charges the offense in the statute's language. But, it continued, when, as in this case, the statute does not define the act or acts constituting the offense, such acts must be alleged specifically. The information was therefore defective, it held.

The reason for this rule, the Court said, is that the defendant may know the nature of the charge for preparation of his defense, and so that the record of his conviction or acquittal may be a bar to a subsequent prosecution for the same offense.

The Court noted that while the statute defined some acts as a "holding out", it did not define "represent", the charge in the instant case.

(*Illinois* v. *Peters*, Supreme Court of Illinois, March 20, 1957, Bristow, J.)

### Federal Courts . . . *jurisdiction and action*

A federal court has declined to make an immediate declaration as to the constitutional validity of a South Carolina statute making it unlawful for any member of the National Association for the Advancement of Colored People to be employed by the state or any school district. But in so doing, a three-judge panel of the United States District Court for the Eastern District of South Carolina has ridden off in three directions.

The statute, in addition to prohibiting public employment to members of the N.A.A.C.P., gives school boards the right to demand a written statement under oath from a teacher that he is not a member of the organization, and provides that any person "refusing to submit a statement as provided herein, shall be summarily dismissed". A preamble to the statute accuses the N.A.A.C.P. of disturbing the "peace and tranquility which has long existed between the white and Negro races . . ." and states that the organization seeks through "insidious propaganda . . . to produce a constant state of turmoil between the races. . . ."

A group of school teachers who refused to submit the required statements challenged the statute as a violation of their constitutional rights.

Judge Williams, announcing the decision of the Court, declared that the Court had jurisdiction to entertain a suit for a declaratory judgment that the statute is unconstitutional, but he ruled that federal courts should not take such action until the state judiciary has interpreted and ruled on the statute. Consequently the Court retained jurisdiction of the case, but reserved a ruling until after the South Carolina courts had acted.

Chief Judge Parker of the Fourth Circuit, sitting as a district judge, said there was no room for state judicial interpretation of the statute because it was clear and unambiguous on its face and just as clearly unconstitutional. He thought a decree should be entered without waiting for action in the state courts.

Judge Timmerman assented to

the postponement of decree by the Court, but he dissented vigorously on other points. He declared the plaintiffs had no standing in Court to attack the statute since they had resigned their positions and had not made applications to teach. But going beyond this disposition, he gave hearty approval to the statute and said that it protected, rather than limited, constitutional liberties. "The statute is designed to protect young minds from the poisonous effects of N.A.A.C.P. propaganda", he wrote. " . . . may God protect the children of America if the courts will not and their parents cannot do so."

(*Bryan* v. *Austin,* United States District Court, Eastern District of South Carolina, January 23, 1957, Williams, J., announced the judgment of the Court, 148 F. Supp. 563.)

## Licenses and Franchises . . . *optometrists*

Delaware licensed optometrists have been unsuccessful in obtaining an injunction against the practice of optometry by unlicensed opticians.

The theory of the suit was that the state's optometry licensing law conferred a property right on licensed optometrists which they could vindicate by enjoining practice by unlicensed persons, but the Supreme Court of Delaware held that the grant of a license conferred no property right enabling the licensee to protect himself from competition by unlicensed persons. The remedy, the Court said, lay in a prosecution by the attorney general of the state under the provisions of the optometry licensing law.

The plaintiffs had attempted to support their position by drawing an analogy to the general rule that a lawyer has such a right or interest in the practice of his profession as to permit him in his individual capacity to sue for an injunction to enjoin others from the unauthorized practice of law. But the Court answered this by saying that even assuming law and optometry were analogous, the rule in Delaware was that a lawyer could not maintain such an action.

One judge concurred with a separate opinion in which he did not go along with the majority's views on the legal profession and said the discussion was unnecessary in order to dispose of the case.

(*Delaware Optometric Corporation* v. *Sherwood,* Supreme Court of Delaware, January 23, 1957, Wolcott, J., 128 A. 2d 812.)

## Municipal Law . . . *curfew ordinance*

Curfew shall not ring tonight in Chico. It's unconstitutional, says the California District Court of Appeal for the Third District.

Chico's curfew ordinance, attacked by way of prohibition against a prosecution under it, provided that it was unlawful for any person under the age of 17 to be on the public streets between 10 P.M. and 5 A.M., except in the company of a parent or guardian, "or where the presence of said minor in said place or places is connected with, and required by, some legitimate business, trade, profession or occupation in which said minor is engaged".

The Court ruled that while the police power permits enactments promoting the health, safety, welfare and morals of the public, it could not support an unreasonable restriction on personal liberty. Therefore, the Court declared, the ordinance was too broad and unconstitutional.

The Court interpreted the ordinance as prohibiting minors under 17 from going to or from night classes, library study, games, dances or other school activities, church functions or the theater. "[T]he general right of every person to enjoy and engage in lawful and innocent activity while subject to reasonable restriction cannot be completely taken away under the guise of police regulation", the Court remarked.

The Court pointed out that the curfew ordinance upheld by a California court in *People* v. *Walton,* 161 P. 2d 498, was much more restricted in scope than the Chico enactment.

(*Alves* v. *Justice Court of Chico Judicial District,* California District Court of Appeal, Third District, February 8, 1957, Peek, J., 306 P. 2d 601.)

## Practice of Law . . . *debt-pooling*

Debt-pooling, when engaged in by persons not members of the Bar or by corporations, is the practice of law and may be enjoined, according to a ruling of the Supreme Judicial Court of Massachusetts.

At stake was the constitutionality of a Massachusetts statute, enacted in 1955, which declares that "the furnishing of advice or services for and in behalf of a debtor in connection with any debt-pooling plan, whereby such debtor deposits any funds for the purposes of making pro rata payments and other distributions to his creditors, shall be deemed to be the practice of law . . ." and provides for a fine and imprisonment for violations.

Some debt-consolidators brought an action for a declaratory judgment that the statute was unconstitutional. The Boston and Massachusetts Bar Associations counterclaimed for an injunction.

Turning aside a contention that the statute usurped the purely judicial function of determining who may practice law, the Court held the statute valid as an enactment in aid of the judiciary's power to make such a determination.

The Court found that debt-poolers engage in the practice of law by favoring creditors with conditional-sales liens or judgment liens over others, thus evaluating the legal effect of some claims over others. The Court declared that the debt-pooler often deprived the debtor of legal advice by undertaking to devise a plan for him.

(*Home Budget Service, Inc.* v. *Boston Bar Association,* Supreme Judicial Court of Massachusetts, January 7, 1957, Wilkins, C.J., 139 N.E. 2d 387.)

## Radio and Television . . . *lotteries*

The television bingo game of a Los Angeles TV station is not a lottery violating the Federal Communication Commission's regulations, the Court of Appeals for the District of Columbia Circuit has held.

The game in question is called "Marko". Viewers play at home with cards obtainable from stores selling the sponsor's products. Numbers are drawn in the studio and shown on a master card on television. Winners telephone the TV station to claim prizes of merchandise, cash and trips.

The FCC's rules and regulations, based on a criminal statute, 18 U.S.C.A. §1304, proscribe the broadcasting of "information concerning any lottery, gift enterprise or similar scheme, offering prizes dependent in whole or in part upon lot or chance. . . ." In *Federal Communications Commission* v. *American Broadcasting Company*, 347 U.S. 284, the Supreme Court, considering the same regulations and statute, refused to go along with an FCC ban on giveaway shows, holding that the mere listening or watching of a program was not sufficient to support the third leg—consideration—necessary for a lottery, the other elements of chance and prize admittedly being present.

In the instant case the Court conceded that the necessity of going out to a store to pick up "Marko" cards came closer to being consideration, but it determined that to so rule would stretch the rules and regulations, which being based on a criminal statute, should be construed narrowly. "The undesirability of this type of program is not enough to brand those responsible for it as criminals", the Court concluded.

One judge dissented on the ground that there was sufficient consideration to support a lottery.

(*Caples Company* v. *U.S.*, United States Court of Appeals, District of Columbia Circuit, March 14, 1957, Bazelon, J.)

## Schools . . . *segregation*

A legal fight begun by a Florida Negro in 1949 to gain admission to the University of Florida Law School is still not concluded. In the latest action the Supreme Court of Florida has refused to issue a writ of mandamus compelling the Negro's admission, on the ground that the issuance of the writ "would tend to work a serious public mischief".

Prior to the United States Supreme Court's first decision in the *School Segregation Cases*, 347 U.S. 483, the Florida Court had turned down three motions for a peremptory writ of mandamus on the ground that the Board of Control of the University of Florida was acting under authority of the Florida Constitution and statutes requiring segregated schools, but in the first two instances the Court had continued the proceeding because provisions for separate-but-equal law-school facilities were not clear.

In reviewing the third case (60 So. 2d 162) via certiorari, the Supreme Court vacated the judgment of the Florida Court and remanded the case "for consideration in the light of the *Segregation Cases* . . . and conditions that now prevail" (347 U.S. 971).

This the Florida Court did by requesting the parties to amend their pleadings. By so doing they presented the single issue of whether the applicant was entitled to admission to the law school upon meeting the routine entrance requirements.

Meanwhile, however, the Supreme Court issued its implementation decision in the *School Segregation Cases*, 349 U.S. 294, which recognized that integration could not occur overnight and permitted local courts to enforce "good faith compliance at the earliest practicable date". Thinking it saw some breathing space, the Florida Court, while recognizing the applicant's right to admission, appointed a commissioner to take testimony and report concerning local conditions and adjustments necessary, so as to have a basis for the issuance or denial of a mandamus writ (83 So. 2d 20).

But while the commissioner was at work the Negro applicant again went to the Supreme Court, which amended its former remand by making it clear that the implementation provisions of the second *School Segregation Cases* decision were not applicable "to a case involving a Negro applying for admission to a state law school", since the Court had previously settled the right of Negroes to enter state graduate schools without discrimination (350 U.S. 413). The Supreme Court declared: ". . . there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates."

Thus the Florida Court, faced with the amended remand and another application for a writ of mandamus, has declined in a four-to-two split to act because mandamus is a discretionary writ which, it says, it retains discretion to issue, the Supreme Court notwithstanding. But the Court said that it did not believe the Supreme Court intended to direct the issuance of the writ. It declared:

> Indeed, it is unthinkable that the Supreme Court of the United States would attempt to convert into a writ of right that which has for centuries at common law and in this state been considered a discretionary writ; nor can we conceive that that Court would hold that the highest court of a sovereign state does not have the right to control the effective date of its own discretionary process. Yet, this would be the effect of the Court's order, under the interpretation contended for by the relator. We will not assume that the Court intended such a result.

Deploring what it felt was the Supreme Court's progressive emasculation of state sovereignty, the Court relied primarily on the results of a survey taken by its commissioner to conclude that issuance of the writ would result in "serious public mischief". The survey, which the Court's majority termed "completely objective", showed that white parents and students would take positive action to compel Negroes to leave the state university if integra-

tion occurred, that 41 per cent of white students would drop out of state universities, that 62 per cent of the parents of white high-school graduates would send their children elsewhere, and that the institutions would lose financial support, including the loss of support of 51 per cent of their alumni. The Court left the way open for the applicant to renew his motion "when he is prepared to present testimony showing that his admission can be accomplished without doing great public mischief".

Two justices concurred specially, one touching on the doctrine of interposition.

Two other justices dissented. One wrote: "It seems to me that if this Court expects obedience to its mandates, it must be prepared immediately to obey mandates from a higher court." The other: "I conceive it to be my plain duty to give effect to the law which has been established by the United States Supreme Court."

(*Florida ex rel. Hawkins* v. *Board of Control,* Supreme Court of Florida, March 8, 1957, Roberts, J., 93 S. 2d 354.)

## Taxation . . .
### *charitable exemption*

The organization which sponsors the annual Senior Bowl football game in Mobile, Alabama, is an educational or civic corporation entitled to income tax exemption, the United States District Court for the Southern District of Alabama has held.

The Mobile Arts and Sports Association, a non-profit corporation, promotes the game. It is the only activity of the group that returns a net profit. What profits there are are used, among other things, to sponsor basketball tournaments, outdoor concerts, ballet performances and choral singing. The organization's over-all objective is to publicize and promote Mobile and its cultural activities.

In the face of this record, the Court ruled that the corporation was exempt during the three years under question and was entitled to a refund of income taxes paid.

The Government argued that even though the organization might be exempt, its income from the Senior Bowl game was "unrelated business income" (§§421-422 I.R.C. 1939 and §§511-513 I.R.C. 1954), but the Court found that promotion of the game was an "integral part of MASA's civic and educational program and bears a close and intimate relationship to the . . . objects" for which the corporation was formed.

(*Mobile Arts and Sports Association* v. *U.S.,* United States District Court, Southern District of Alabama, January 31, 1957, Thomas, J., 148 F. Supp. 311.)

## Zoning . . .
### *variances and exceptions*

What power does a local zoning board of appeal or adjustment have to grant variances and exceptions from a municipal zoning plan? An illustration comes from a recent decision of the Court of Appeals of Kentucky.

Involved was a tract in Paducah which backed on the Tennessee River and had a frontage of 365 feet on a street in an industrial section of the city. The zoning line went through the property—the back three fourths being heavy industrial and the front quarter general business. The owner sought a variance or exception for the front portion of the tract to enable him to sell the property to an oil company which planned to build petroleum storage facilities, prohibited in a general business zone.

The Court held that the zoning board of adjustment had exceeded its powers in granting the owner's request. In effect, the Court declared, the Board changed the zone and exercised authority reserved for a legislative body. Neither did the Court see any unnecessary hardship resulting to the oil company, since it did not own the property.

One judge dissented. He thought the Court had emasculated the Kentucky statute which authorizes an adjustment board to decide appeals and applications for special exceptions where a literal enforcement of zoning regulations results in unnecessary hardship. "In effect the opinion abolishes the board", he said.

(*Arrow Transportation Company* v. *Planning and Zoning Commission,* Court of Appeals of Kentucky, December 14, 1956, as modified on denial of rehearing March 15, 1957, Waddill, C., 299 S.W. 2d. 95.)

## What's Happened Since . . .

■ On March 25, 1957, the Supreme Court of the United States:

DENIED CERTIORARI in *Ginsburg* v. *Black,* 237 F. 2d 790 (43 A.BA.J. 68; January, 1957) leaving in effect the decision of the Court of Appeals for the Seventh Circuit that the distribution by the Chairman of the Committee on Hearings of the American Bar Association of an allegedly libelous memorandum filed with him to members in several states did not constitute "publication" of the alleged libel, and that even if such distribution were publication it was accomplished by the Committee Chairman rather than the authors of the memorandum, who were the defendants.

DENIED CERTIORARI in *School Board of the City of Charlottesville* v. *Allen,* 240 F. 2d 59 (43 A.B.A.J. 260; March, 1957), leaving in effect the decision of the Court of Appeals for the Fourth Circuit that an injunction seeking a short end to racial segregation in public schools may be granted where school authorities have announced an intention of continuing segregation; that under such circumstances Negro children are not obliged to exhaust administrative remedies by individually applying for admission before commencing suit; and that a suit for such an injunction is not a suit against a state within the meaning of the Eleventh Amendment.

# Department of Legislation

**Charles B. Nutting,** Editor-in-Charge

**The participation of citizens in the legislative process is essential if the public interest is to be served. An outstanding example of such participation is found in the work of the organization described in the following article. The author, Attorney and Assistant Secretary of the Jones and Laughlin Corporation, is chairman of the committee referred to.**

## *The Legislative Committee of the Civic Club of Allegheny County, Pennsylvania*

***by Edward C. Ford***

For over fifty years the Legislative Committee of the Civic Club of Allegheny County, Pennsylvania, has shown what a group of public spirited citizens can accomplish in promoting legislation for civic progress. The Civic Club is composed of many hundreds of men and women from all walks of life. The professions, such as law, medicine and accountancy, are prominently represented in its membership. Members of the teaching profession, of the welfare agencies and of the business community also take an active part in its activities. The Club's financial support depends almost entirely on the modest dues of its many members. Its attitude on civic matters can therefore be expressed free of partisan bias or of debt to special interests.

The Civic Club was organized in 1895 in the day when Pittsburgh was more noted for its smoking furnaces and the tempo of its industrial life than for civic improvement. The Club's constitution stated as its objective "to promote by education and by organized non-partisan effort, a higher public spirit and a better social order". This objective has continued unchanged to the present day.

The efforts of the Club in the field of legislation began very modestly. In 1897 the Club suggested to the City Council the enactment of ordinances providing for the cleaning of sidewalks and for prohibiting fast riding and driving and the throwing of fruits and vegetables on the streets. At that time the Club also began its advocacy of civil service reform to provide a merit system in the state and municipal governments. In 1903 the Civic Club established a formal committee system for reviewing proposed legislation and making recommendations in regard thereto. This Committee system with only minor changes is still followed.

The legislative activities of the Club are centered in a Legislative Committee. Under that committee there are now twelve subcommittees to review legislation in special fields and to report their recommendations to the Legislative Committee. These subcommittees review proposed state legislation pertaining to apportionment, conservation and roadside beauty, constitutional amendments, education, election laws, health, labor, major and minor judiciary, municipal government, stream pollution, taxation and welfare, respectively. Each member of the Civic Club may serve on the Legislative Committee and on any subcommittee or subcommittees which he or she may select. It is interesting to note that over 10 per cent of the entire membership of the Club elects to serve on at least one such committee. From time to time special committees are appointed to study a bill or a group of bills of particular public interest or to draft a bill which the Club believes would be in the public interest.

Subcommittees are generally small. They are headed by a chairman selected because of his or her professional background or because of particular knowledge or interest in the subject matter to be reviewed by the subcommittee. Each subcommittee chairman is encouraged to recruit such additional subcommittee members from the Club's roster as he or she believes might aid the subcommittee in its work.

The Legislative Committee and the subcommittees are on a permanent basis. However, their real work begins when the Pennsylvania Legislature goes into session. Arrangements are made through a local legislator for the Club to receive copies of all bills introduced in either house of the Legislature. The bills as received are scanned by the Club staff and assigned to appropriate subcommittees. The staff also sends to the subcommittee chairman such background information on the bill as is available in the Club headquarters. If the Legislative Committee has previously reviewed a similar bill the subcommittee chairman is informed of the previous action of the Legislative Committee. The Club has never regarded consistency as such a virtue as to preclude the Club from reversing its stand in regard to any particular legislative proposal. However, the Club feels that the subcommittee chairman should at least be informed of what has been the past attitude in regard to the particular legislative matter.

The subcommittee chairman studies the bills as received and decides which bills merit the subcommittee's consideration. Several thousand bills are introduced in each biennial session of the Legislature. It is therefore important that each subcommittee chairman carefully screen the bills to determine which to present to the subcommittee. As soon as the subcommittee chairman feels that he has sufficient bills of interest to the subcommittee he calls a meeting of his subcommittee. The bills are discussed in the meeting. Often proponents and opponents of a particular legislative proposal are invited to at-

tend the meeting and to express their views. The subcommittee then makes its recommendations to the Legislative Committee.

The Legislative Committee meets about once a week while the Legislature is in session. The subcommittee chairman reviews with the Legislative Committee the bills studied by his subcommittee and gives to the Legislative Committee the recommendations of the subcommittee. The Legislative Committee more frequently than not approves the recommendations of the subcommittee. However, when it disagrees with the recommendations it refers the bill to the subcommittee for further study or the subcommittee is reversed by the Legislative Committee.

The Chairman of the Legislative Committee reports the recommendation of the Committee to the Board of Directors of the Club. The Board historically has usually approved the recommendations of the Legislative Committee. However, the Board sometimes returns bills to the Legislative Committee for further study. The final action of the Board of Directors is regarded as the considered opinion of the Club. Thus each legislative proposal considered by the Club has had the thoughtful consideration of three separate groups before the Club expresses its attitude.

The recommendation that a particular legislative proposal is IN THE PUBLIC INTEREST or is NOT IN THE PUBLIC INTEREST is released to the Club membership in periodic reports to the members. The recommendation is also sent to the legislators representing Allegheny County in the Pennsylvania General Assembly and is released to the public through newspapers, radio and television. The Club however refrains from any lobbying activities. The Club makes a concerted effort to bring its opinion to the attention of the Legislature and to publicize its opinion. Beyond an expression of opinion the Club does not exert any political type or special interest type of pressure persuasion.

On occasions proposed federal legislation of special significance has been reviewed. However the Club considers that its legislative efforts should be concentrated in the field of state and local legislation where it can most effectively make its position known.

The Bar of Allegheny County has contributed much to the success of the Legislative Committee of the Civic Club. Through the years scores of local lawyers have served on the Committee and on its subcommittees. The Chairman of the Legislative Committee is usually a member of the local Bar. Certain subcommittees, such as the subcommittee charged with the study of proposed constitutional amendments and the subcommittee charged with the study of proposed legislation pertaining to the major and minor judiciary, are generally headed and staffed by members of the local Bar.

An interesting sidelight on the work of the Legislative Committee is the participation of political science students from the local colleges and universities. The colleges and universities are invited to have their students attend the meetings of the Legislative Committee and of the various subcommittees. The students who have availed themselves of this opportunity have reported that they found participation a rewarding experience. The members of the Committees have been equally appreciative of the younger viewpoint.

In the very early years of the Legislative Committee's existence it was concerned primarily with child labor and juvenile court bills and with other social reforms considered radical at the time. In the early 1900's it vigorously advocated conservation at both state and federal levels, compulsory education, betterment of factory and other working conditions, parole and probation measures, medical inspection in the public schools and tenement house laws.

With the beginning of World War I, the scope of the Committee's interests widened. It became interested in a new charter for the City of Pittsburgh. Through the Club's Committee on Reorganization of Government in Allegheny County, the Club has conducted studies of plans for the consolidation of the functions of Allegheny County's four cities, seventy-eight boroughs and forty-seven townships in the interest of more efficient municipal administration. The Legislative Committee has felt that the problems of Allegheny County and its various subdivisions can be dealt with most effectively at the local level. It has therefore been a vigorous advocate of "home rule" legislation under which local governing bodies would have more latitude in conducting their affairs.

The Legislative Committee has been especially interested in legislation concerning children. It has been active in its advocacy of bills to improve the educational opportunities of Pennsylvania children. The Committee has supported legislation to provide special training for handicapped children, extension of kindergartens, adequate salaries for teachers and teacher tenure. A long-time goal of the Club was the enactment of a law providing for a separate juvenile court for Allegheny County. Such a law was finally enacted in 1933. A bill drafted by the Civic Club provided for the establishment of the first training school for delinquent boys in the County.

The legislative activities of the Civic Club have contributed much in laying the groundwork for the civic renaissance which has occurred in Pittsburgh during the past decade. The necessity for smoke control was recognized at the first meeting of the Club in 1895. The Civic Club sponsored a smoke control ordinance which as enacted in 1906 was later declared unconstitutional. However, the Civic Club continued to urge effective smoke control regulations. These efforts met with success in 1941 when the City of Pittsburgh enacted an effective smoke control ordinance. In 1943 the Club drafted and had presented to the Pennsylvania Legislature an act to permit Allegheny County to enact smoke control regulations. The act was passed and the regulations enacted.

*(Continued on page 569)*

# Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman.**

## *Option To Deduct Intangible Drilling and Development Expenses*

***By Ethan B. Stroud***
***Dallas, Texas***

Section 263 (c) of the Internal Revenue Code of 1954 provides an exception to the general rule disallowing the deduction of capital expenditures in the case of intangible drilling and development costs of oil and gas wells. This code section directs that ". . . regulations shall be prescribed by the Secretary . . . corresponding to the regulations . . . which were recognized and approved by the Congress in House Concurrent Resolution 50, Seventy-ninth Congress".

The prior Regulations referred to in the statute (Reg. 118, Sec. 23 (m) - 16) provided that intangible drilling and development costs incurred by an operator could be deducted from gross income as an expense at the operator's option. However, in *F.H.E. Oil Co.* v. *Commissioner,* 147 F. 2d 1002 (5th Cir. 1945), some doubt was cast upon the validity of those Regulations. Attempting to remove this cloud of invalidity, the Congress passed a concurrent resolution in 1945 approving those regulations which had granted the option to expense intangibles. Since this resolution was not an act of Congress, signed by the President or passed over his veto, some small doubt concerning the option remained until Section 263 (c) was written into the 1954 Code.

The congressional direction of Section 263 (c) has been followed by the Treasury Department in Section 1.612-4 of the proposed natural resources regulations. This new intangible deduction regulation incorporates some novel departures from the prior rule, and, in effect, sets forth a new set of principles for applying the option. The new refinements, however, were implicit in but omitted from the language of prior Regulations.

The new intangible deduction rule is divided essentially into two parts. The first part is aimed primarily at a single owner of the working interest in an oil or gas property, while the second part is directed at two or more owners of the working interest in an oil or gas property.

The first part of the rule provides that an owner of an operating mineral interest may, at his option, deduct as expenses the intangible drilling and development costs incurred in the development of an oil and gas deposit to the extent that these costs are attributable to his share of the total of all operating mineral interests in the well. The second part of the rule provides that if more than one person owns an operating mineral interest in an oil or gas well, each owner's share of the total of such interests during the complete pay-out period is the share of the operating net income from the well that he is entitled to receive during that complete pay-out period. Each owner may, therefore, at his option, deduct a fraction of the total intangible drilling and development costs, less all costs which are recoverable out of production payments, royalties and net profits interest, but not in excess of the lesser of either the actual intangible costs incurred by him, or his fractional share of the operating net income that he is entitled to receive during the complete pay-out period. In addition, if any owner incurs a part of the total intangible drilling and development costs in excess of his share of the total of all operating mineral interests in the well, such excess must be capitalized and recovered through depletion. Thus, the deductible portion of intangible expense is determined by the division of the operating net income during a selected portion of the period of production which has been designated the "complete pay-out period". It should also be noted that the determinative unit is a well rather than a property.

In order to understand how the rules operate it is first necessary to analyze four new terms employed therein. The phrase "operating mineral interest" is a term borrowed from the rules pertaining to aggregation. Section 614 (b). It is defined as a separate mineral interest in respect of which the costs of production are required to be taken into account by the taxpayer for the purposes of computing the limitation of 50 per cent of the taxable income from the property in determining the deduction for percentage depletion as provided in Section 613, or would be so required if the well were in the production stage. Thus, an operating mineral interest has been technically defined but in a manner more or less synonymous with the industry's interpretation of a working interest. It is the antithesis of a royalty or an oil payment. The phrase "complete pay-out period" is defined as being the period measured by the time it takes for the operating net income from the well, after payment of all costs of operation, to equal all expenditures for drilling and development, both tangible and intangible, less all such expenditures which are recoverable out of production payments, royalties and net profits interests. This pay-out period concept was adopted by the Treasury Department to prevent the intangible deduction being taken by a taxpayer to whom the working interest might be assigned for a brief period, with immediate

reversion after the assignee had obtained the tax benefit of the deduction. Thus, a part of the intangible deduction is lost unless the working (operating mineral) interest is retained for a period of time coinciding with the "complete pay-out period". The phrase "total operating gross income" is simply the gross income from the well excluding royalties, oil payments and net profits interests. It is equivalent to working interest income. The phrase "total operating net income" is the total of the operating gross income reduced by the costs of operation. These operating costs, however, do not include tangible or intangible development costs or deductions based thereon such as depreciation and depletion. Consequently, total operating net income is clearly not the same thing as taxable income defined in Section 63 of the 1954 Code.

The new rules operate in this manner: Where there is only one owner of the working or operating interest, such as a sole lessee of an oil or gas lease, this owner may expense in full all of his intangible drilling costs (if he properly exercises the option), since the deductible portion of the intangible expense is based on the fraction of operating net income during the complete pay-out period and a single owner's share of this income must be 100 per cent. Royalties, overrides, oil payments and net profits interests being non-operating interests do not dilute this share. Furthermore, a sole lessee can meet the second hurdle since his intangible costs could not be in excess of his share of the total of all operating mineral interests in the well.

Where there are two (or more) co-owners of an oil and gas property and each incurs drilling and development expense in proportion to his fractional interest in the well being drilled and thereafter shares income and expense in the same manner, each co-owner may deduct his fractional part of the intangible expense. This fractional part that can be deducted is determined by calculating the co-owners' fractional share of the operating net income from the well during the complete pay-out period and then dividing that fraction into the total intangible costs. Thus, four co-owners of the working interest in a lease expend $100,000 drilling and equipping a well—$80,000 is intangible expense and $20,000 represents completion costs. If each owner contributes $25,000 and shares one quarter of the subsequent income and expense, the intangible deduction of each owner is $20,000. (Deduction equals share of operating net income (¼) x total intangible costs—$80,000.) Where one owner pays more of the drilling costs than the others, the amount deductible will never be in excess of the co-owner's fractional share of operating net income during the pay-out period and may be less if this fraction is greater than the actual intangible costs expended.

Where a party transfers the operating interest to another in consideration for the assignee's drilling and developing a well at his own cost and expense with the assignor retaining a reversionary right after the assignee has recovered from the transferred interests certain specified drilling, development and operating costs, the following result occurs: The assignee of the working interest may expense the entire amount of his intangible drilling costs where he drills, equips and operates a well on the assigned property, if under the agreement 100 per cent of the oil runs from the working interest are his during the complete pay-out period. To illustrate, assume that the lease owner, *A*, assigns this lease to *B*, in consideration for *B*'s drilling, equipping and operating a well thereon. *B* has an operating mineral interest since he is responsible for the costs of production. When *B* has recouped all of his costs from the operating net income, assuming there is production, a fractional part of the working interest reverts to *A*. This reversionary interest may be 100 per cent or less. *B* incurs intangible drilling costs of $60,000 and tangible costs of $40,000. The complete pay-out period will be the time that it takes for the operating net income from this well to equal $100,000, plus the cost of operation in the interim. Since *B*'s fractional share of the operating income during the pay-out period is 100 per cent, he may expense all of his intangibles, or $60,000. If, however, *A*'s interest reverts as soon as *B* recovers his intangible costs, *B*'s intangible deduction will be less. Assuming that an undivided one half of the lease reverts to *A* at that time, *B* could deduct only $48,000.00, since his share of the operating income during the complete pay-out period has dropped to 80 per cent. (*B* now has 100 per cent of 60 per cent plus 50 per cent of 40 per cent or 80 per cent. Stated another way, the fraction which represents *B*'s share of the operating net income during the complete pay-out period is 6/10ths plus ½ of 4/10ths, or 4/5ths.)

The principles are the same, but more complicated computations are necessary in transactions involving farm-outs with retained overrides carrying a working interest exchange privilege, turn-key drilling contracts of co-owners, carved out drillsites or assignment for services.

# OUR YOUNGER LAWYERS

Kirk McAlpin, Secretary and Editor-in-Charge, Savannah, Georgia

### *Proposed Reorganization of Junior Bar Conference*

For the past several years, it has been apparent that the rapid growth of the Junior Bar Conference was rendering its organization obsolete. It was generally felt that the state and local units did not have sufficient voice in shaping the policies of the Conference, with resultant lessened interest.

Last year's annual meeting at Dallas uncovered glaring inequities and inadequacies. To advise remedies, Chairman Farrer appointed Robert R. Richardson, of Atlanta, to head a hand-picked committee. Every member is a man who has done outstanding work in the Conference and who has had opportunities to become thoroughly familiar with the over-all workings of the Conference. In addition to Chairman Richardson, the members named were Robert G. Storey, Jr., of Dallas; F. William McCalpin, of St. Louis; Bryce M. Fisher, of Cedar Rapids, Iowa; Arthur M. Lewis, of Hartford; and James M. Ballangee, now of Philadelphia.

A voluminous interchange of memoranda and correspondence among the members evolved ten points as a basis of reorganization prior to a meeting of the Committee held in Chicago on October 27, 1956. Working closely with the very important Committee on By-Laws, of which Thomas E. Taulbee, of Wilmington, Delaware, is Chairman, a plan for reorganization has now been prepared for presentation to the Junior Bar Conference at its Annual Meeting in July, it having already received the approval of the Executive Council at its Midyear Meeting.

The most significant change proposed is the creation of a House of Delegates to establish the general policies of the Conference, to hear all committee and council reports, resolutions, and such other matters as may affect the general welfare of the Conference. Regardless of its status as an affiliate unit, each state, territory, the District of Columbia and the Commonwealth of Puerto Rico will be entitled to two delegates, and each local affiliate unit will be entitled to one delegate. The House will convene at each annual meeting.

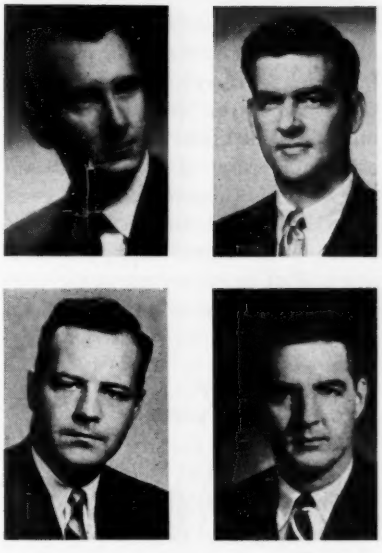
Council members will be elected by a caucus of the state delegates from within the circuit affected, leaving the Nominating Committee to consider only the national officers. Council members and officers who have served a full term will not be eligible for re-election.

The Conference would be placed on an end-of-annual-meeting to end-of-annual-meeting basis instead of a calendar year basis, in conformity with the custom in all other American Bar Association Sections.

The establishment of the House of Delegates would give state and local units a voice in establishing general policies of the Junior Bar Conference, superseding the present plan of sending delegates to the meetings with no function to perform. It is felt that this "grass roots" approach to the Conference's policies and problems will make it more truly representative of its 25,000 members.

### *Participants Announced for Annual Debate of Conference on Personal Finance Law*

One of the major attractions at the Annual Meeting is always the debate of the Conference on Personal Finance Law, for which four outstanding members of the Junior Bar Conference are selected as participants. The subject chosen this year is, "Under the Small Loan Law, Does an Unintentional Overcharge Render a Loan Contract Void?"



**Participants in Annual Debate of Conference on Personal Finance Law. (Upper, left to right) Robert S. Mucklestone, of Seattle, Washington; Gibson Gayle, Jr., of Houston, Texas. (Lower, left to right) William Reece Smith, of Tampa, Florida; and Robert R. Richardson, of Atlanta, Georgia.**

Representing the plaintiff will be Robert R. Richardson, of Atlanta, and William Reece Smith, of Tampa. Richardson, formerly President of the Younger Lawyers Section of the Georgia Bar Association, is now Executive Council Representative for the Fifth Circuit, while Smith, a Rhodes scholar, is now Personnel Director of the J.B.C.

The defense will be ably argued by Robert S. Mucklestone, of Seattle, formerly Chairman of the Washington J.B.C., and Gibson Gayle, Jr., of Houston, Texas, formerly Chairman of the State Junior Bar for Texas and now Information Director of the J.B.C.

The argument will be held at 4:00 P.M. July 15, in the Empire Room of the Waldorf Astoria Hotel. After the argument, there will be a reception in honor of the judges and participants.

Further experiments will be made this year to determine the feasibility of courtroom photography. Judge Philbrick McCoy, of Los Angeles, Chairman of the Special Committee on Canons of Ethics which is considering a revision of Judicial Canon 35, with his Committee, have been invited to attend the debate this year to see how modern equipment enables photographers to make pictures without disturbing the judicial process.

### *South Carolina Junior Bar Organizes*

On March 22, the first meeting of the South Carolina Section of the Junior Bar Conference was held in the auditorium of the School of Law of the University of South Carolina at Columbia. Guests at the meeting were Harvey Chappell, of Richmond, Fourth Circuit Executive Council Representative, and Kirk McAlpin, Secretary of the J.B.C. Dean Samuel L. Prince, of the Law School, and Douglas McKay, Sr., of Columbia, addressed the meeting.

Forrest K. Abbott, of Cayce, was elected Chairman to head an Executive Committee composed of Wendell McCrackin, of Charleston; J. Reese Daniel, of Columbia; Grady Kirven, of Anderson; Bruce Foster, of Spartanburg; John K. DeLoache, of Camden; and M. A. McAlister, of Dillon. Julius W. McKay's inspirational guidance was recognized as being instrumental in the organization's formation.

Professor Charles Randall of the Law School Faculty presented a proposed program for informing law students of the work of the J.B.C. Plans are being made for a mock trial to be held next fall for the benefit of law students and others interested.

Saturday afternoon, following an excellent and well attended luncheon, an exceptionally good panel forum was presided over by Frank Sloan, of Columbia, dealing with "The Trial of a Law Suit".

### *Plans For Workshop at Annual Meeting*

The Workshop, always an outstanding drawing card, will be given major billing at this year's Annual Meeting. Under the direction of J. Rex Farrior, Jr., of Tampa, elaborate plans have been made to enhance the value of this helpful feature.

Beginning at 10:00 A.M. Saturday, the Workshop will last all day. There will be no conflict with any other J.B.C. meeting or function.

Rex Farrior plans to have six speakers from different sections, allotting thirty minutes to each, followed by a fifteen-minute discussion period. Under consideration at this time are a number of unusual projects which have been successfully carried out, including, among others: The Milwaukee Junior Bar's Civic Affairs program, for which it received a $10,000 grant from the Fund for the Republic; the Philadelphia Junior Bar's High School Visitation project and legal aid to juvenile delinquents; the Baltimore Junior Bar's radio-television program, "Court of Appeals"; the St. Louis Junior Bar's economic survey of the incomes of young lawyers; the Florida, Connecticut and Mississippi Junior Bars' programs of educating young lawyers in the practical problems facing them, bridging the gap between law school and practice; as well as projects of moot courts, speakers' bureaus, constitutional amendment campaigns, office law clinics, and others.

Outlines of each talk will be mimeographed for distribution so that those attending will be able to take back the information to their local organizations.

### *Chairman Farrer's Travels*

In furtherance of the Conference's work, Chairman Bill Farrer has attended meetings in various parts of the country during the past few months.

On March 30, Chairman Farrer was a speaker on a panel of Districts 2 and 3 Phi Alpha Delta Law Fraternity's Conclave held at the Ambassador Hotel in Los Angeles, on the subject of "What Type of Law Practice Do I Want?"

Accompanied by Vice Chairman Bert Early, he attended the annual meeting of the Kentucky State Bar Association at Louisville and spoke at the General Assembly luncheon on April 3.

On April 5, he met in Chicago with Bob Keating, of Denver, Jim Economos, of Chicago, and John Rendleman, of Carbondale, Illinois, for the purpose of co-ordinating details of the Traffic Courts Committee's "Visitor-Violator" program and the Vanderbilt Survey which are major Conference objectives for 1957.

On May 8, he attended the Utah State Bar Meeting, going from there to the Denver Regional Meeting on May 9.

### *New Officers of Kentucky Junior Bar*

At the Annual Meeting of the Kentucky Bar Association in Lexington, at which William C. Farrer, Chairman of the J.B.C., was a speaker, the Younger Lawyers' Conference elected new officers. The following is the slate selected: President, James Chenault, of Richmond; President-Elect, William E. Rummage, of Owensboro; Vice President, Herbert D. Sledd, of Lexington; and Secretary, Ben G. Matthews, of Shelbyville.

### *Plans for Annual Meeting*

Richard Edmondson and John Hunt, of New York, Co-Chairmen of the Annual Meeting Committee, have made announcement of plans for the July meeting.

Registration will begin on Friday, July 12, at the Belmont-Plaza, and the first business session will be a Directors' Meeting at 4:30 P.M. in the Chairman's suite at the Belmont-Plaza. The annual Candidates' Party will be held that evening.

The Belmont-Plaza will be the scene of the annual breakfast on Saturday morning at 8:00 A.M. J. Ross Ker, of Vancouver, President of the Junior Barristers Section of The Canadian Bar Association, will address the members.

At the First General Session, following the breakfast, appointments to the Nominating Committee, Award of Merit Committee and Res-

olutions Committee will be made. After this, there will be a Workshop Session. The final business of the day will be a meeting of the Executive Council at 2:00 P.M.

The traditional dinner dance will take place Saturday in the recently redecorated Bowman Room of the Hotel Biltmore, which has one of the largest dance floors available in New York.

The Executive Committee meets again at 10:00 o'clock Sunday morning, but there is nothing on the agenda for the general meeting until the reception at the United Nations at 3:00 P.M.

At 12:30 P.M. Monday, there will be a Junior Bar Conference luncheon at the Belmont-Plaza.

Monday afternoon, the second general session will be held to receive the reports of the Nominating Committee, the Resolutions Committee and the Award of Merit Committee, after which the election of officers and council members for the coming year will be held.

The Personal Finance Debate will take place in the Waldorf-Astoria at 4:00 P.M. Monday, followed by a reception and cocktail party.

The last business session will be a joint meeting of the old and new councils to be held at 10:00 A.M. Tuesday morning at the Belmont-Plaza, after which the meeting will adjourn to reconvene in London.

Among American Bar Association social events which may be enjoyed by J.B.C. members are a boat ride around Manhattan on Monday and a fashion show for the ladies to be held at the Waldorf on Tuesday.

# Activities of Sections

## SECTION OF CORPORATION, BANKING AND BUSINESS LAW

The decision of the New York Court of Appeals in 1956 in *Miller* v. *Discount Factors Inc.* 1 N.Y. 2d 275, 135 N.E. 2d 33, holding a certain "discounted" note void on the grounds that discounting by a non-banking corporation was in violation of the Banking Law and the General Corporation Law, caused much consternation in New York legal-financial circles. While, after research and analysis, most New York financial lawyers concluded that the reasoning in the decision would be narrowly limited to similar factual situations, the language used by the court suggested the advisability of clarifying legislation. Because of the possible implications of the decision, our Committee on Developments in Business Financing, under the chairmanship of Malcolm Fooshee, has undertaken a nationwide study to determine whether statutes or decisions comparable to those in New York might cause similar problems in other states. An article by Homer Kripke, a member of that Committee, disclosing the results of the study, will appear in the next issue of *The Business Lawyer.*

Our Bankruptcy Committee and the Council of our Section have approved without dissent H.R. 5195, introduced in the House of Representatives by Congressman Celler. Authority has been solicited from the Board of Governors to support on behalf of the Association before appropriate congressional committees this bill or any similar bill. H.R. 5195 was prepared at the instance of the National Bankruptcy Conference. The drafting committee consisted of Professor James A. MacLachlan of Harvard Law School and Milton P. Kupfer, both members of our Bankruptcy Committee, and Professor Frank Kennedy of the University of Iowa. Briefly, the bill does three things. It makes clear the distinction between statutory and consensual liens by adding a new subdivision 29 to Section 1 of the Bankruptcy Act. It corrects the effect of *Matter of Quaker City Uniform Co., Inc.,* 238 F. 2d 155, (3d Cir. 1956) by eliminating the circuity of lien concept as applied in that case. And third, it defines the trustees' rights so as to exclude any fiction of "relation back" prior to bankruptcy and to exclude any added rights of a creditor extending credit at an earlier date, thus overcoming the effects of *Conti* v. *Volper,* 229 F. 2d 317, (2d Cir. 1956) and *Constance* v. *Harvey,* 215 F. 2d 571, (2d Cir. 1954).

A special committee of our Section has been constituted to explore and report on the desirability of forming a permanent committee to serve as liaison between our Section and all organized groups of international lawyers with particular reference to the impact of foreign and international law on commercial transactions. An attempt will be made to determine whether such a committee, without in any way conflicting with or duplicating the efforts of the Section of International and Comparative Law of the Association, could be of service to business lawyers of the country, that is, to general practitioners rather than specialists in international, consular or foreign law. Otto C. Sommerich, President of the American Foreign Law Association, has assumed the chairmanship of the special interim committee which also includes Davidson Sommers, Vice President and General Counsel of International Bank for Reconstruction and Development, Albert Herrmann, of the New York Bar, Professor Kingman Brewster of Harvard Law School, William Roy Vallance, Assistant Counsel, State Department, and Secretary-General of the Inter-American Bar Association, Thomas E. Monaghan, General Counsel of Standard Oil Company of New Jersey, Charles

*(Continued on page 576)*

# BAR ACTIVITIES

**Charles Ralph Johnston • Editor-in-Charge**

D. Bernard COUGHLIN

The 1957 Annual Meeting of the Kentucky State Bar Association was held in Lexington on April 3 and 4, with President Victor A. Bradley, Sr., of Georgetown, presiding. Over five hundred of the 3,752 members of the Association attended this meeting.

The Judicial Conference met on April 2 in conjunction with the meeting of the Association, with Chief Justice James B. Milliken of the Court of Appeals presiding. Speakers at the Conference sessions included Watson Clay, of Frankfort, Judge of the Court of Appeals, who spoke on the subject of "Remittitur and Additur—Should It Be Adopted in Kentucky?", Robert K. Cullen, of Frankfort, also a Judge of the Court of Appeals, on "Frequent Errors of Trial Courts", and Associate Justice E. Harris Drew, of the Supreme Court of Florida, who addressed the Conference Banquet.

The newly elected officers of the Kentucky State Bar Association are D. Bernard Coughlin, of Maysville, President; Richard L. Garnett, of Glasgow, President-Elect; and Ben B. Fowler, of Frankfort, Vice President. Henry H. Harned, of Frankfort, was reappointed Secretary-Treasurer. J. Paul Keith, of Louisville, and Laurence T. Gordon, of Madisonville, were elected to the Board of Bar Commissioners, the governing board of the Association. Delegates to the House of Delegates of the American Bar Association are Marion W. Moore, of Covington; Ben B. Fowler, of Frankfort; and Robert P. Hobson, of Louisville.

David F. Maxwell, of Philadelphia, President of the American Bar Association, was the principal speaker at the General Assembly Luncheon. At this session certificates conferring the title of Senior Counsellor were presented to thirty-two members who had completed fifty years of practice.

Interesting features of the meeting included studies on juries, a trial judges panel, an unauthorized practice forum and a taxation program at which T. Coleman Andrews, of Richmond, Virginia, discussed "The Evils of Taxation".

Recently retired Associate Justice Stanley Reed, of the Supreme Court of the United States, spoke on "Our Constitutional Philosophy" at the Annual Banquet.

O. B. EIDSON

The Bar Association of the State of Kansas held its 1957 Annual Meeting in Wichita on April 25 to 27, with an attendance of over 750 members. President J. Willard Haynes, of Kansas City, presided.

The following officers were elected to serve until the 1958 annual meeting which will be held in Topeka, May 8-10: President, O. B. Eidson, of Topeka; President-Elect, Jay W. Scovel, of Independence; and Vice President, W. M. Beall, of Clay Center. George B. Powers, of Wichita, was re-elected Secretary-Treasurer. L. A. McNalley, of Minneapolis, was elected to the Executive Council.

Local bar awards, based upon initiative, service and accomplishment in the fields of law, public relations and administration of justice, were presented to the Wichita Bar Association, the Johnson County Bar Association and the Rice County Bar Association.

The incorporation of The Kansas Bar Foundation was announced by a special committee and members elected to serve as the first Board of Trustees include Walter G. Thiele, of Topeka; L. J. Bond, of El Dorado; Robert E. Russell, of Topeka; Robert G. Braden, of Wichita; C. E. Chalfant, of Hutchinson; James E. Taylor, of Sharon Springs; O. B. Eidson, of Topeka; Jay W. Scovel, of Independence, and John W. Shuart, of Topeka, the Executive Secretary of the Association. The Foundation is a non-profit corporation established to promote charitable, scientific and educational purposes.

Don Hyndman, Director of Public Relations of the American Bar Association, spoke at a general session on the subject of "Public Relations". Following Mr. Hyndman's talk, the film *The Medical Witness,* prepared by the American Bar and American Medical Associations, was shown and a panel discussion was held on the subject "Do We Need an Interprofessional Code Between the Bar and the Medical Profession?" Participants were doctors and lawyers.

Other topics discussed at the sessions were "Effective Use of Photographs in Lawsuits", by Charles C. Scott, of Kansas City, Missouri; "Lawyers' Retirement" under the new Social Security provisions, by S. C. Brennan, District Director of the Social Security Administration; "Lawyers' Retirement" under the proposed Jenkins-Keogh Bill, by J. H. Laffer, George B. Powers, and C. Merritt Winsby, all of Wichita; and "Joint Tenancy Revisited", by James D. Dye, of Wichita. A debate was held on "Uniform Rules for Pretrial Procedure" on the closing day of the meeting with Dave Prager, of Topeka, taking the affirmative side and Wayne Coulson, of Wichita, the negative.

During the general assembly twelve Kansas lawyers who have practiced law for more than fifty years were presented with certificates.

Guest speakers at the meeting included David F. Maxwell, President of the American Bar Association, and Cecil E. Burney, of Corpus Christi, Texas, who gave the principal address at the annual banquet.

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The president-elect of a county bar association with a membership of sixty reports that the interest of the members in monthly meetings has been on the decline for several years. We shall be pleased to receive suggestions for stimulating interest among the members of small bar associations.

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We believe that the story of the development of the public relations program of the Minnesota State Bar Association should be of value to other associations working on similar projects. This pioneer program started in 1948 under the chairmanship of W. W. Gibson, of Minneapolis, who still serves in that capacity.

The first step was the taking of a public relations poll to determine the advisability of going forward with a comprehensive program. One of the conclusions drawn from this poll indicated that a marginal legal business of $3,000,000 or more was being taken by the public to unauthorized practitioners in the State of Minnesota. Based upon analysis of the poll, a four-part program was set up which, in the words of the Public Relations Committee, is as follows:

1. To tell the lawyers' story, we want to undertake an institutional campaign in the state's newspapers. Our messages will be kept at a high professional level but they may serve to remind laymen of the many legal services rendered by lawyers.

2. To defend democratic liberty, we intend to sponsor a public service type project in the form of a competition which will induce many people to stop and think of our priceless heritage of liberty and of the lawyer's place in the defense of that liberty.

3. To serve unselfishly, we plan to continue and increase those services which we have already been rendering.

4. To merit public confidence, we must be sure that our own house is in order at all times. We must keep ourselves alert to the possible effect upon public opinion of the things we do, both as individuals and as an association.

A statewide organization was formed with a representative from each judicial district and a drive for voluntary contributions from members of the Bar was initiated. After considerable effort approximately $40,000 was raised from 2800 members. Pamphlets were developed and printed and made available to the members of the Bar and to the public without cost. Other projects were started and it became apparent that the funds available for these purposes would soon be depleted and that the program would sag. Within a year the state bar dues were increased $10, which gave the association a substantial amount for a continuing public relations program. The association now spends $20,000 to $25,000 a year on the program.

A column, "It's the Law" is prepared and sent to 500 newspapers weekly. This is to fulfill what the association feels is its obligation to keep the public advised as to what the lawyer is doing and what the lawyer can do.

A school program is offered by the Minnesota State Bar Association to the high schools of the state for the purpose of aiding and broadening the students' conception and understanding of democratic government under law, and the place of courts in our society. A pamphlet is furnished to the schools listing these subjects—Constitution, Laws, Lawyers, Communism, Domestic Relations, Divorce, Courts, Traffic Laws, Criminal Law, Citizenship, Descent and Distribution, Commencement of Lawsuit, Trial by Lawsuit, Incompetent, Irrelevant and Immaterial, Government by Man vs. Government by Law, and Voting—and lawyers are sent as representatives of the Minnesota State Bar Association to give talks on these or other subjects which instructors might suggest. Recently the Association has sent two automobile pamphlets, *It May Be Your Turn Next* and *Minnesota Traffic Laws* to over 500 high schools in Minnesota with the idea that these pamphlets will be supplied to senior high school students, many of whom will be taking a driver's training course.

The association distributes a handbook for jurors in sufficient quantities so that each juror in Minnesota is given a copy when he is called for jury duty. It also prepared last year and again this year a series of very helpful income tax releases.

Bert A. McKasy, Executive Secretary of the Minnesota State Bar Association, says: "It is my thought that a sound public relations program should build confidence in the public mind as far as the legal profession is concerned and that the result of such confidence will keep the law in the hands of the lawyers where it belongs."

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The Philadelphia Bar Association's Committee on the Pennsylvania Plan is conducting a plebiscite of the members of the Philadelphia Bar on the merits of the Pennsylvania Plan for Selecting Judges. The purpose of the plebiscite is to enlist the aid of the organized Bar in a campaign to have the plan adopted through an amendment to the state constitution.

Langdon W. Harris, Jr., Chairman of the Committee, says that lawyers being polled will be asked simply to indicate either their approval or disapproval of the plan. Accompanying each ballot is a brochure from the Philadelphia Bar Association pointing out the shortcomings of the present system of selecting judges. The Pennsylvania Plan proposes that the Governor make judicial appointments from a panel of qualified persons nominated by a non-partisan judicial commission composed of one judge, three members of the Bar and three lay citizens

appointed by the Governor. If the majority of voters favor retention of the judge in office, he will serve a full term and at its expiration may run again, unopposed, for another term. He would run only on his record, rather than against a political opponent.

Mr. Harris reports that at the time of this writing 1129 of the 4000 ballots which were mailed have been returned with 86 per cent indicating approval of the plan.

The State Bar of Wisconsin and The University of Wisconsin are presenting the Third Annual House Counsel Institute at Madison, Wisconsin, on August 26, 27 and 28. Co-operating in the presentation are the Wisconsin Manufacturers' Association, the Wisconsin State Chamber of Commerce and the Illinois State Bar Association. The institute will cover the role of the house counsel, interstate business, industrial insurance, foreign operations and trade regulations.

Speakers scheduled for the three-day meeting include Louis Quarles and H. W. Story, Vice President and General Attorney, Allis-Chalmers Manufacturing Company, both of Milwaukee; Fred L. Cox, Georgia Department of Revenue, Atlanta, Georgia; Jerome R. Hellerstein, Associate Professor of Law, New York University; Dr. Elston L. Belknap, Marquette University School of Medicine, Milwaukee; Walter M. Bjork, of Madison, Wisconsin; Ralph E. Gintz, Wisconsin Industrial Commission, Madison; Dr. Roger B. Maas, Employers Mutual Insurance Company, Wausau, Wisconsin; Carl J. Gilbert, President of The Gillette Company, Boston; Victor H. Kramer, Department of Justice, Washington; and Hammond E. Chaffetz and George E. Frost, of the Chicago Bar.

A registration fee of $25.00 will be charged for the institute. Payment of this fee will entitle the registrant to attend all sessions and to receive a copy of a publication which will be prepared following the institute and which will include most of the papers presented at the institute. It is possible to register for sessions for individual days. Further information may be obtained from Professor August G. Eckhardt, Room 104, Extension Building, University of Wisconsin, Madison 6, Wisconsin.

On April 24, seven hundred and two members of the New Jersey State Bar Association were admitted to practice before the Supreme Court of the United States. Chief Justice Warren in welcoming the lawyers termed the event "the greatest pilgrimage in Supreme Court history". When Robert S. Snevily, of Westfield, President of the Association, originated the idea of the mass induction, he thought from fifty to one hundred lawyers would respond to the invitation to join the group. The invitations were sent out with the notices of the Association's mid-winter meeting and by the end of March, over 700 completed applications had been received.

A special train from Newark was chartered and made various stops throughout New Jersey. The lawyers were sworn in in groups sponsored alternately by President Snevily and by Miss Emma E. Dillon, Executive Secretary of the Association. Chief Justice Warren said that this was by far the largest group that had ever been admitted in one day. A previous mass admission was in September of 1950, when the American Bar Association met in Washington when over five hundred were admitted.

At the 1956 Annual Meeting of the American Bar Association, the House of Delegates adopted a resolution prepared by the Committee on Military, Naval and Air Law of the Section of International and Comparative Law, recommending that "state and local bar associations promote the increase of knowledge of the Geneva Conventions by conducting and giving their assistance to courses of instruction for civilian agencies and for other local organizations whose members may benefit from the Conventions or be called upon to conduct themselves in conformity therewith".

Pursuant to this resolution, the Committee on Military, Naval and Air Law prepared a lecture on the Geneva Conventions of 1949, which includes a brief history of the development of treaties having the same basic objectives as the Geneva Conventions, as well as an explanation and analysis of the more important features of the Conventions. Copies of the lecture may be obtained from the Chairman of the Committee on Military, Naval and Air Law, Major General Stanley W. Jones, The Assistant Judge Advocate General, Room 3E-346, The Pentagon, Washington 25, D. C.

The Headquarters of the New Jersey State Bar Association was dedicated on November 5, 1953, with ceremonies in the War Memorial Building in Trenton. The Headquarters building, a three-story brick-frame structure, is in downtown Trenton, a stone's throw from the State House, and provides conference rooms, office and library space, which had long been needed by the nearly 3000 members of the Association.

The subject of having its own Headquarters building in Trenton had been before the Board of Trustees of the Association for almost twenty years before one was acquired. A move into larger offices in a downtown office building became necessary on two occasions with an increase in rent each time, but with not enough increase in space to accommodate meetings of committees. In 1952 there was an appreciable increase in rent and the Association also found itself unable to acquire additional needed space so the matter of a headquarters building became a live topic again. The Board of Trustees recommended that a building be purchased, the Association adopted the recommendation and a committee was appointed to search for suitable accommodations, which were located at 229 West State Street.

The staff of the Association, headed by Dr. Emma E. Dillon, Execu-

Emma E. DILLON

New Jersey State Bar Association Headquarters

ive Secretary, moved into the new Headquarters on August 1, 1953. The Association occupies the first floor consisting of seven rooms, four baths and a kitchen. The rental from the remainder of the building helps to carry it.

A substantial portion of the building's $75,000 purchase price was raised by contributions from lawyers and others interested in the legal profession. Although the full amount of the purchase price was not paid by the time the Association took title to the property and it was necessary to get a mortgage to complete the transaction, Secretary Dillon reports that this is nearly paid off.

Members of the Association use the facilities frequently, because its proximity to the State House makes it possible for them to arrange for conferences with their clients or other lawyers, and make use of the library, which was acquired by contributions by law book companies and by members of the Association.

## In the Public Service

The following pamphlets have been prepared and published by the MINNESOTA STATE BAR ASSOCIATION, 500 National Building, Minneapolis, Minnesota:

**Adoption in Minnesota.** Lawyers and judges are often asked questions relative to adoption by persons anxious to adopt a child. This information has been prepared to help such persons to better understand adoption laws and procedures and to better understand why there must be safeguards in connection with such arrangements.

**Duties, Responsibilities, and Limits of Authority of a Notary Public in Minnesota.** This pamphlet has been prepared by the Practice of Law Committee of the Association. Its purpose is to help the notaries of the state understand the powers and duties of their office and thus to perform their important public functions accurately and expeditiously.

**Are You Overpaying Your Taxes?** This leaflet gives simple answers to common questions about income, gift and inheritance taxes, and points out a few of the considerations generally overlooked by laymen.

**Are You Sure You Want To Sign That?** discusses some of the common agreements made daily and what you should know about them to protect yourself and others from the unpleasant and often costly results of misunderstanding.

**Have You Made a Will?** gives simple answers to common questions about the importance of making your will: Who can make a will? Must a father leave each of his children a dollar? How long does a will last? What happens when there is no will? Is joint tenancy a substitute for a will?

**The Buying and Selling of Your Home** answers these questions: Do you need a title examination? What is a real estate title? What is an abstract? What is a title examination? Is possession nine points of the law? Does examination for a mortgage lender protect a purchaser? Is a warranty deed from a responsible party adequate protection? What is a Torrens Certificate? Do you realize the importance of earnest money contracts?

**Know Your Rights** tells you about your rights under the law in three practical situations—when you are sued, when you are arrested, and when you are injured.

To obtain the courtesy of using any public service materials mentioned in this section, write to the publishing association, enclosing a check for 50 cents for the first six copies or less plus 5 cents for each additional copy requested.

# *Practicing Lawyer's guide to the current* LAW MAGAZINES

**Arthur John Keeffe** • Editor-in-Charge

ADMINISTRATIVE LAW: The editor-in-chief of *The Federal Bar Journal,* Andrew P. Murphy, Jr., has been kind enough to allow me to read in galley proof the October-December, 1957, issue of that periodical (address: 1737 "H" Street, N.W., Washington 1, D.C.; price: $5 per year or $1.50 per quarterly copy). It is a remarkable job. Published in the swamp where George Washington put our nation's capital and written by lawyers that make their living either working for the Government or as lawyers fighting it, there is within these pages the bitter and important conflict between the trial lawyer who prefers the traditional protections of the courtroom and the government lawyer who prefers the alleged *"expertise"* of the administrative agency.

Dean Roscoe Pound writes a foreword. It is typically Pound. And refreshing it is to read that he still hopes for a National Ministry of Justice, but that meanwhile, he has faith that our law schools will develop "a generation of trained lawyers who can work out the relations of their specialties to the legal order as a whole and make administrative law not the least branch of a unified system."

John W. Cragun and Rodolphe J.A. de Seife, of the District of Columbia Bar, join in presenting a colloquy between a "young man" and a "skeptic" as to the right and wrong of administrative law. I must confess, I am allergic to this style of presentation but nevertheless under the *nom de guerre* of Skeptic, the authors bring up such disturbing points as: the reason for the creation of the I.C.C. that set the administrative pattern and the *expertise,* if any, that administrative tribunals possess. In this connection they say:

> An agency head is, because he is an agency head, an "expert" even though until he was appointed last week he may have been only a lame-duck Congressman or a heavy contributor to the administration's campaign fund, or a violent partisan of one view or another as to how the agency should be conducted. . . .

Mr. Skeptic concludes by applauding the efforts of our Association "to bring real meaning to the reforms suggested by the Hoover Commission".

Willard W. Gatchell, General Counsel of the Federal Power Commission, and Earl W. Kintner, General Counsel of the Federal Trade Commission, write in defense of administrative law as it is and attack the proposal of the Second Hoover Commission for the creation of an Administrative Court. Gatchell emphasizes that Herbert Hoover and five of his commissioners did not vote for the proposal. In further argument he would have you believe that our administrative bodies are "expert" and competent and much more so than judges. Kintner goes even further than Gatchell. He defends the combination of the prosecution and judge function as extremely desirable. Rejecting the Brownlow Committee criticism espoused by Professor Robert Cushman of Cornell, he defends with fervor the present set-up under which agencies both accuse and judge. Like Gatchell he says the agencies are "expert":

> The expertness of an administrative agency includes more than the heads of the agencies themselves. The entire agency, through its specialized staff and experience, is the source of administrative expertness. It is this type of expertness which not even the heads of agencies claim to possess as individuals. This type of expertness . . . is the expertness not of one but of many. No judge, however specialized or able, can claim to this type of expertise.

Kintner lays emphasis on the report of the District of Columbia Bar Association Committee against the Administrative Court proposal and the unfortunate experience of the old Commerce Court.

Donald C. Beelar, of the District of Columbia Bar, undertakes to answer Earl Kintner. Unfortunately he says he wrote before he read Kintner's piece. Nevertheless, his article is most interesting in that he suggests that, under Article III of the United States Constitution, a citizen in conflict with his government ought to have a trial by an Article III court. And in this connection he makes timely objection to the creation of more agencies than the some 120 or more we now have. Most valuable are his suggestions for improvement. First, he suggests there be an Administrative Office like the one for the federal courts. Second, he believes there should be business management planning for "case traffic demands and court capacity". Third, he complains that the appeal records are outmoded and imperfect vehicles. Fourth, the appeal statutes "are a weird patchwork". In this connection he calls attention to the difference in the appeal of Federal Trade Commission orders depending on whether the agency or a citizen appeals. Fifth, judicial review should be "judicialized" and "the 'yo-yo' cases which bounce up and down between agency and court" should be determined. Finally, he suggests specialized courts for transportation and labor cases, "Federal Rules of Agency Proceedings" like the federal rules for civil and criminal cases and an "early establishment of a Federal Reporter system for agency decisions which would make these decisions

official and currently available through advance sheets to parallel the Federal Reporter system of court decisions."

Bernard Schwartz, Professor at New York University Law School, and active in our Association's Administrative Law Section writes a piece that I have read and re-read. As I understand it, he would like to see the Congress review administrative rules and procedures legislatively much the way some six states do and the way the Congress does the Federal Rules. The thought is good, but Capitol Hill by necessity cannot worry too much about dull tasks devoid of the publicity that politics and sex always receive. In view of the sharp attack that both Messrs. Gatchell and Kintner make against proposed amendments to the Administrative Procedure Act and in particular the Administrative Court, one can regret that Professor Schwartz did not reply to their charges. Perhaps he wrote before reading their articles.

Most interesting to me in this symposium is the article written by my old friend Commodore F. Trowbridge vom Baur with whom I once did West Point breathing exercises of the stale fish air at the entrance to Sweet's Restaurant in Fulton Fish Market. That stale fish smell always made the Commodore long to be sailing at Kennebunkport, Maine, and the Navy is fortunate indeed to have the old salt as its general counsel. Like Captain Kidd, vom Baur attacks administrative procedure at the jugular with his cutlass. His points are hard to answer: One, we have administrative law to handle legal materials in a different way from lawyers—he calls it "anti-professionalism" a word so obscure it's too bad Wigmore missed it even though he created "autopic preference". Two, administrative law places the function of determining facts and deciding questions of law in the hands of persons otherwise engaged in governmental business. He develops this second point by going back to the reign of Henry II in 1178 when five men, two clerks and three laymen "were to hear all the complaints of the Kingdom". As a result, the Commodore states that officials to whom administrative decision is given serve in the executive branch "most subject to the dictates of political expediency". And those who serve as members of an alleged independent agency are not, in that unlike judges of Article III courts who serve for life, they serve for a term of years. The trial in the administrative agency is before an examiner. Until the Administrative Procedure Act of 1946, the lot of the examiner was so low that one chairman of an agency remarked examiners were "to keep the windows closed and spittoons clean". The 1946 act has given examiners something "resembling judicial independence" but Skipper vom Baur thinks much remains to be done and he views the major objective of the Second Hoover Commission and our Association's Special Committee on Legal Services and Procedure "to raise the role of the examiner close to the judicial level". The Commodore emphasizes that the heads of agencies are too busy to do the careful judicial work that the extensive records, complicated facts and lengthy briefs demand, that many of the officials who do this legal work are not lawyers and their role is further complicated by their absolute power and their combined prosecutor and judge function.

Trow vom Baur has the courage to say something that needs saying, to wit:

> If we are to admit the realities of everyday life, we should face the fact that in the administrative sphere litigants frequently consult persons vested with these functions, ex parte. In addition, it has been common practice for members of Congress to call on the telephone and to write letters to members of the independent agencies and government officials who are engaged in performing this function, making requests which they would not presume to address to a judge of the courts vested with judicial power. Moreover, in the past there have been rumors of "leaks" to favored litigants from members of the regulatory agencies with respect to the decision of important cases, in advance of public announcement, something which still has no real counterpart with the courts.

Of course, this all too true comment goes back to the temporary appointment of the administrator who must remain in political favor to keep his job, unlike the federal judge who holds a lifetime appointment.

I have one regret about this Kennebunkport sailor's piece. It's so good I wish I had written it myself. In saying this, however, I do not wish to endorse the Commodore's statement that the low state of administrative law is due to "the failure of our law schools generally to recognize as their most important responsibility to society the improvement of the administration of justice" (see footnote 1). The "crack" does not shock me at all—the footnote expresses the "fear" it "will shock many". The regrettable tendency of all of us is to blame the evil of the law on the Bar, the Bench or the professoriate, depending upon whether you are a judge, a lawyer or a professor. The truth is, if any of us look in the mirror we will see who is to blame. Except for footnote one, the footnotes are as interesting as the article itself and very well done.

## Notice of Annual Meeting of Members of American Bar Association Endowment

The annual meeting of members of the American Bar Association Endowment will be held during the Annual Meeting of the American Bar Association, August 14-16, at the Waldorf-Astoria Hotel, New York, New York, for the election of two members of the Board of Directors for terms of five years and for the transaction of such other business as may come before the meeting.

All members of the American Bar Association are members of the Endowment.

*(Continued from page 502)*

that knowledge, settlement results almost as a matter of course when both sides see that it is to the best interest of each to settle.

I acknowledge that I react with some considerable impatience these days to the suggestion that pretrial conference procedure is a waste of time in automobile accident cases where the factual and legal issues are not often complex or difficult. I cannot understand why that suggestion is still advanced in the face of the overwhelming evidence that it is precisely in the field of automobile accident litigation that New Jersey has realized by far the greatest benefit from the procedure, not alone in the increase in the proportion of cases settled to cases tried, but in the better justice which inevitably flows from the ability of both sides to find out before trial everything they need to know about their own and the other side's case.

The next and last of the five features I would mention is the assignment power vested by the Constitution in the Chief Justice. Probably that is the most delicate and important of the myriad administrative duties which, to my personal knowledge, take from one third to one half of Arthur T. Vanderbilt's work day which begins at eight o'clock every morning and continues until a late hour most evenings. Every county has its ups and downs in volume of litigation, but the larger counties have a chronic condition of large lists where the time of the less busy judges from the smaller counties can usefully and economically be employed. But every assignment out of his county may present a judge with home or personal problems, and the Chief Justice has always been humanly aware that this is so. He gives an interminable amount of time to this duty, in telephone calls, personal conferences with the judges involved in transfers, and with the assignment judges. In the very nature of things, this responsibility must continue to be a difficult task for any Chief Justice.

But there is another facet of the assignment power which also has a most important bearing on administration. I refer to the selection of the assignment judges. New Jersey's system operates throughout its twenty-one counties. The detailed work of administration in each county cannot, of course, be done from Trenton. There has to be an administrative head for each county in the same manner that a business firm breaks up a large territory in order to gain maximum efficiency in the whole operation. It is exclusively the responsibility of the Chief Justice to appoint one of the Superior Court judges as Chief Judge, called the Assignment Judge, to be in his county administratively the vice president or branch manager of the system. In addition to his regular judicial duties, the Assignment Judge keeps close tab on the dockets in all the courts, assigns cases to the other judges from the master list prepared at his direction, and has general administrative authority within the county. His responsibilities are in the field of criminal as well as civil litigation. He must charge the grand juries and may interpose to try criminal cases of particular public importance or interest. His powers of administration are extensive. Flexibility, as opposed to rigidity, must be his watchword. In him then, too, is required a talent and capacity for executive responsibility; it would be a disappointment to a Chief Judge to find himself without enough Superior Court judges with the capacity for this vital and important work. This is the reason I suggested earlier that the factor of executive ability is also important in the selection of Superior Court judges.

## Current Calendars. . . *An Amazing Record*

That concludes my discussion of these five features. They were the principal techniques developed and applied after the Judicial Article became operative, and consider what has been accomplished under them. In September, 1948, when we started, trial lists were two or more years in arrears, and some cases actually were pending up to eight years. Within three years, by 1951, all arrears were cleared up, and current cases were being tried, if not previously settled, at least within nine months and more often within six months after complaint was filed. It was an amazing record—a miraculous achievement still to some metropolitan centers in other states chronically bogged down with lists three and four or five years old. But actually all that was done in New Jersey was that able executive talent devised and applied ordinary business principles to the operation of a simple integrated court system. Given that structure any state can do the same and we are more than happy to let every jurisdiction of the land profit from our example.

I do not mean, however, that the millennium has been reached in New Jersey and that we may sit back sure that all is well. Indeed, there have been times since 1951 when we have feared for our ability to keep abreast of the increase in litigation experienced in New Jersey, as in every other populous industrial state, in the wake of the economic upsurge which our nation has experienced since the end of the war. But the Chief Justice saw the danger early and took the leadership in suggesting the legislation which authorizes the transfer to the District Courts of any automobile accident case which at pretrial conference is appraised as not promising the plaintiff a recovery in excess of the $3,000 jurisdictional limit of the District Court. Currently, too, he has found it necessary temporarily to add one hour to the court day of some counties to catch up with a backlog and to keep abreast of the growing lists. The point of these examples is that the system is now geared to make such expedients possible, and it must always be so if we are to head off trouble before it arrives.

I have the definite conviction that New Jersey can never safely abandon any of the features of administration which I have discussed if we are to hold our gains. And in the case of the mandatory requirement for pre-

trial conference procedure and the judges' weekly reports, the values we realize from them apart from their contributions to the currency of our calendars would make their discontinuance a lamentable retreat from those things which best serve the public interest. New Jersey is experiencing a tremendous population growth and enormous development which inevitably means more and more litigation. Retention of our proved administrative tools may not alone suffice to handle the load. More and better courthouse facilities in many places will inevitably be required. And in time we may require an increase in the number of judges. But at the very least we will have to continue to rely on the administrative tools which eight years of unceasing effort on the part of countless judges and lawyers have forged to the degree of proficiency which today allows most of the members of the Constitutional Convention to see in their lifetimes how right they were in what they did, and how great a contribution theirs has become and can remain to the advancement of better justice. It would be tragic indeed if a single one of these fine tools were discarded or blunted. Yet Senate Bill 58 of 1948 would have killed pretrial discovery and pretrial conference procedures at birth by limiting inquiry to matters admissible in evidence at the trial. Only Governor Driscoll's veto averted that catastrophe. And at the 1955 state bar meeting in Atlantic City there was a long debate on a resolution, happily defeated, which proposed to make pretrial conference procedure voluntary in automobile accident cases, and where had at all, primarily a conference of judge and counsel around a table to explore settlement. And every county bar association but one or two violently opposed the enactment of the bills for the transfer of cases to the District Court. Even Governor Meyner found that his plea for the bills fell on deaf ears when he spoke personally in support of them to the trustees of the State Bar Association. Only the Governor's leadership and the leadership of equally responsible legislative leaders saved the day on that occasion. The press and public-spirited citizens generally have no doubt that we must not let down our guard lest those prevail whose judgment of what is best in the public interest is seemingly prejudiced by personal or other irrelevant considerations.

On July 7, 1958, Arthur T. Vanderbilt will be 70 years of age, and will be required by the Constitution to relinquish his office as Chief Justice. Several centuries ago another great judge was famed for his ability to bring order and efficiency to the courts. He was Sir Thomas More, Lord Chancellor of England in the reign of Henry VIII. When he took office the docket was crowded with cases, some of them twenty years old. He, too, knew how true it was that the spirit if not the letter of justice requires a prompt hearing and settlement of suits; otherwise an injustice is perpetuated and aggravated. So great was his skill in devising processes to bring cases to the point of prompt hearing that the day arrived when not a matter or man was left to be heard. A jingle commemorates his achievement:

> When More some time Chancellor had been
> No more suits did remain.
> The like will never more be seen
> Till More be there again.

But what we have in New Jersey is not alone the product of Arthur T. Vanderbilt's leadership. It is the work of many hands. It has been solidly built to endure through the terms of many Chief Justices. His great accomplishment as the first Chief Justice is that he blazed the trail where there was none and marked it so well for us that the handiwork of his administration must ever challenge succeeding administrations to mark it better. This much is clear. We must not retreat from the high point we have reached. We must go beyond in an increasing effort to attain what in truth is the unattainable summit. Man has striven from the beginning

of time for better justice and will continue to strive for generations and generations past our own. Yet New Jersey's contribution is one of the great milestones on that road. The sorrow of any retreat on our part lies not alone in the disservice to our own citizens but, as well, in the blow it would deliver beyond the borders of our state to the valiants who are struggling in so many places to have our example emulated in their own states. The Attorney General of the United States only recently organized a conference of agencies to make a national frontal attack on the problems, state and federal, impeding justice through bad judicial administration. The model held up to the conference as to what should be done is what has been done in New Jersey. We must in good conscience go forward. We must never, never retreat.

## The Legal Profession in England

*(Continued from page 510)*

Society (on behalf of solicitors) and the Institute of Chartered Accountants in England and Wales in the making of repeated representations to the Government (on behalf of more than twenty professions) both orally and in writing on the urgent need to introduce legislation to implement the recommendation of a Committee set up several years ago by the Chancellor of the Exchequer, that members of the professions should be entitled to apply a percentage (12 per cent-18 per cent according to circumstances), of their gross earned incomes each year without deduction of any income tax, to the purchase of life annuities designed to produce an annual pension at the age of 65. It is no exaggeration to say that the whole future of the Bar may well depend upon whether or not some concession of this character is granted and there will be intense disappointment if the Chancellor of the Exchequer does not provide the necessary remedy in the April budget.[1]

It is perhaps appropriate to mention here that retirement benefits are not the only aspect of tax law with which the Council concerns itself. It has at the present time a Committee which is prepared to consider any income tax problem of general and personal interest to members of the Bar, and to advise on the best course of action to be taken, *e.g.*, negotiation with the Inland Revenue or the fighting of test cases. One such problem which the Committee is about to tackle is the refusal of the tax authorities to allow the cost incurred by barristers in travelling to and attending international legal conferences as deductible expenses for the purpose of income tax assessment.

Reform of tax law is but one aspect of law reform, a subject in which the Council is specifically expected to interest itself. Its work in this sphere falls under two separate headings. First, the giving of evidence to Royal Commissions and Government Departmental Committees which are charged with the duty of examining the law on given subjects and making recommendations as to reform. Where these subjects are within the experience of legal practitioners, the Council is invariably invited to submit memoranda and to send representatives to give oral evidence. On such occasions it is the normal practice to set up a special committee to prepare the necessary evidence for approval by the Council. These committees are composed mainly of barristers who specialize in the particular subjects under review, irrespective of whether they are serving members of the Bar Council. (All committees of the Council have the widest powers of co-option.) At the present time there are special committees preparing evidence for Departmental Committees on Administrative Tribunals and Inquiries and on Bankruptcy Law. Other examples in recent times were the preparation and submission of evidence to the Royal Commission on Marriage and Divorce and the Departmental Committee on the Law relating to Homosexual Offenses and Prostitution.

From time to time the Council through its Law Reform Committee also takes the initiative in advocating changes in existing law, *e.g.*, recommendations have recently been made regarding certain anomalies as to the measure of damages which can be recovered by those involved in accidents to air transport on the one hand and to sea and land transport on the other. Further subjects which have recently received attention in this way are the publicity at present given to preliminary proceedings in criminal cases when heard by examining Magistrates the powers of the police, and the power of Ministers to prohibit evidence being adduced in the courts on grounds of public interest.

The Council plays an important part in the administration of the Legal Aid and Advice Act 1949. This act in a sentence enables persons with incomes or capital resources below a given level (which is dependent upon the size and composition of the family) to bring or defend civil proceedings in some cases without cost to themselves or otherwise at a cost which cannot exceed a contribution payable over a period and which is ascertained at or before the commencement of the proceedings. The Act which now extends to proceedings in the County Court as well as in the High Court, provides that in order to qualify for legal aid, the plaintiff or defendant must obtain a certificate which is issued by a committee consisting of barristers and solicitors, who have to be satisfied that the assisted person has on the face of it good legal grounds for bringing or defending the proceedings. Members of the Bar give their services on these legal aid committees all over England and Wales and also on other Area Com-

1. The Chancellor of the Exchequer announced his intention in his April budget of 1956, to adopt this recommendation and it was implemented by the Finance Act 1956. This permits a self-employed person to apply 10 per cent of his earned income up to a maximum of £750 per annum to the purchase of a life annuity and to treat any sum so applied as an expense for tax purposes. The limit is extended on a sliding scale for older self-employed persons, rising to a maximum annual contribution of 15 per cent of earned income up to a limit of £1,125 in the case of a person born in or before 1907.

mittees which consider appeals from the certifying committees. All the barristers concerned are nominated to serve on these legal aid committees by the Bar Council. In addition to service on the committees, the percentage of practicing barristers who have entered their names on the panels of those who are prepared to undertake the conduct of cases of legally aided persons is very high.

### An Important Field . . . *Conduct, Etiquette*

An important field of the Council's work is professional conduct and etiquette. Although the Council has no disciplinary powers, which are vested exclusively in the Benchers of the Inns of Court, it has since its inception given rulings on questions of etiquette which are published in the Annual Statements each year. These rulings cover a very wide range of subjects, for example from the circumstances in which a television broadcast may be given by a practicing barrister to guidance on what counsel may and may not do in a criminal case where his client privately confesses his guilt during the course of the trial or when it is about to begin.

Apart from giving official guidance on professional etiquette, the Council investigates complaints against members of the Bar and, where they appear to be well founded, send the papers to the Inn of Court of which the barrister concerned is a member.

Not a little of the Council's work is devoted to counsel's remuneration. In general, fees in each case are the subject of negotiation before the hearing and there are no scales except in the County Court and for criminal defenses where the accused is granted legal aid. But the level of fees is governed to no small extent by the system for the taxation of costs, whereby after the hearing of a civil case, the amount of costs (including counsel's fees) which the losing party has to pay to the successful party, is fixed by an official of the Court. The quantum of fees so allowed is in some cases, especially as regards pretrial work, extremely low and little or no account appears to be taken of the tremendous post-war increase in the cost of living. The matter is of importance to the Bar because solicitors not unnaturally do not like to agree to pay a greater amount in fees than they will be able to recover in the event of their clients being successful. The Council is consequently interested, if indirectly, in the machinery of taxation and on occasion makes representations regarding the taxation of counsel's fees to the appropriate authority. There is a more direct interest in cases where counsel is appearing for a client who has been granted legal aid because in such cases his fee is not agreed in advance but fixed at 85 per cent of the amount allowed by the taxing officer. If he is aggrieved at the fee so allowed, counsel can in certain circumstances appeal to a judge and the Bar Council frequently gives advice and assistance in the conduct of these appeals which are of considerable importance to the Bar as a whole because the decisions create precedents by which the taxing officers are bound in later cases of a similar nature.[2] Apart from the foregoing, the Council is also prepared to give assistance in cases where undue delay occurs in the payment of counsel's fees, or the solicitor for some reason declines to pay them at all. A barrister cannot sue for his fees, which are regarded as an honorarium, but a solicitor is by etiquette under an obligation to pay them. In the event of a dispute arising the barrister and solicitor concerned are invited to submit it for arbitration to a tribunal of which one member is nominated by the Bar Council and the other by the Law Society.

Another function of the Council is to examine proposed legislation for provisions which affect the Bar, *e.g.*, as regards the right of parties to be legally represented before courts and tribunals. This task is complicated by the fact that important matters of this kind are often not contained in Acts of Parliament but in Regulations which Ministers of the Crown are empowered to make by Acts of Parliament and which are so multitudinous that time does not permit of their individual examination by the Council's staff.



In the field of external relations the Council maintains a constant link with a number of international legal bodies and frequently sends a representative or representatives to their conferences, and invites members of the Bar to contribute papers on the topics to be discussed. At home the Council has taken its part in conjunction with the Law Society on a number of occasions in organizing conferences in London, the most recent example being the Commonwealth and Empire Law Conference of 1955 which was attended by nearly 1,000 delegates. On such occasions the Inns of Court play an important part in offering hospitality, which they are ideally equipped to do. Apart from organized meetings, assistance and hospitality is extended each year to a considerable number of individual lawyers from overseas.

In the course of the activities

2. In *Rolphe* v. *The Marston Valley Brick Co.*, 2 W. L. R. 929, it was held that neither the Legal Aid and Advice Act nor the Regulations issued thereunder contained any authority for the bringing of appeals against the decisions of Taxing Officers as to the quantum of counsel's fees or solicitors' costs in legal aid cases. Steps are now being taken to correct this omission.

which have been outlined above and many others, constant liaison is maintained with Government Departments, principally the Lord Chancellor's Office and the Home Office, and other professional organizations, in particular the Law Society.

The question is asked what services should be given by the Council, which are not already provided. As on many other matters there is no unanimous opinion at the Bar about the additional activities which should be undertaken, and their priority, although there is no lack of suggestions. But there is a body of opinion which holds that greater importance should be devoted to public relations and what is commonly called in North America "Institutional advertising", *i.e.*, publicity for the profession as opposed to any individual member of it. There is no doubt that the Bar is not infrequently misrepresented in the national press of Great Britain, and on occasion attracts attention of a hostile character. The most familiar theme (based on publicity given to fees alleged to be earned by some members of the Bar in individual cases, or to the incomes which they are said to be earning), is that the Bar is an eldorado, providing for all its members a glamorous career and astronomical remuneration, which results in a high cost of litigation. The other side of the picture which shows that a very substantial proportion of the practicing Bar is not earning a living (a survey in 1953 showed that barristers of between five and twenty years standing earned less than £800 per annum on average); and that its younger members have a desperate financial struggle for years on end to keep going until they have established a practice, is seldom if ever portrayed. The numerous factors other than counsel's fees and solicitors' costs which contribute to the cost of litigation are not explained. Nor is any space devoted to emphasizing the vital part which the profession plays in the administration of justice and the unique spirit of mutual trust and confidence between Bench and Bar which is a cornerstone of the English legal system. It is accordingly extremely difficult for the public to see the Bar in its true perspective and one tangible and serious effect is that bar students are often completely oblivious of the hazards which they will have to face.

Although replies are made on occasion to individual newspaper articles, and factual information given to the press about conditions and life at the Bar, whenever opportunity presents, the usual policy is to run what is thought to be the lesser of two risks, namely to maintain silence rather than to invite further undesirable publicity which might be a consequence of "rising to the bait" with frequent rejoinders. But those who are "public relations conscious" hold the view that a true perspective can only be instilled by a planned and continuous policy of publicity through the press and the broadcasting medium. This is already done by some professional organizations but it does not come easily or naturally to the majority of members of the Bar, all of whom are brought up in a tradition which abhors individual publicity, to become attuned to the idea of collective publicity; added to which is the difficulty that a small organization does not have at its disposal the staff or financial resources to engage in what would undoubtedly be a heavy and expensive undertaking.

As a sub-division of the public relations problem, there is a further respect in which the Bar has so far not attempted to keep step with many of its fellow professional organizations—the production of its own journal. The arguments in favor of having one require no elaboration. But the difficulties involved in producing a journal of the requisite standard are again those of lack of adequate staff and finances.



## Department of Legislation

*(Continued from page 552)*

The City of Pittsburgh and the Allegheny County smoke control regulations have been responsible for changing Pittsburgh from what was once known as the "Smoky City" to one of the cleanest and most attractive metropolitan areas in the nation.

In the field of water pollution abatement the Civic Club long was an advocate of the Ohio River Valley Compact through which the eight states in the Ohio River drainage basin would co-operate in controlling water pollution. Despite intense opposition of various interests this Compact finally became an actuality at the end of World War II.

The Legislative Committee has supported efforts to regulate the erection and maintenance of billboards. It has sponsored measures to promote roadside beauty and to improve traffic and transit facilities. It has advocated improved health services and better recreational facilities. In line with the aims of the Club the Committee has at all times sought to promote the physical improvement and cultural advancement of Pittsburgh and Allegheny County.

No statement of the work of the Legislative Committee would be complete without some mention of the various other committees of the Civic Club which work with it in promoting civic progress. An active Zoning Committee reviews the building and zoning regulations of the City of Pittsburgh. A Budget Committee composed principally of certified public accountants and other technically qualified persons reviews the City, County and Pittsburgh School District budgets and makes suggestions for improvements in fiscal procedures. Another committee of the Club is concerned with improved library facilities for the residents of Allegheny County.

**Magna Charta Documents**

(*Continued from page 498*)

nymede, was fixed as the place; June 15 as the time.

There the opposing forces met. The King had only a few of his remaining supporters with him. Across the river the baronage was assembled, surrounded by such a host that John realized that he could not now retreat nor retract. There sometime between June 15 and June 19, 1215, John granted the demands by the charter known in history as Magna Charta, the Great Charter.

It is not difficult to trace the provisions of the Articles directly into Magna Charta. The Articles have been described as "Magna Charta in embryo". Sometimes their very phraseology was used. The sequence was altered somewhat; additions and amendments in details were made, but the substance is all there. The Articles are simple but decisive. An attempt to summarize would amount to an effort to refine refined gold. To explain each article would involve a recital of the social, economic and feudal ills of a hundred years of maladministration. But to those at Runnymede all was succinctly and clearly stated by the Articles and in the Charter.

Yet strange indeed it is that it is almost impossible to find a translation of the Articles in English. Therefore an English translation is appended.[2] Numerous translations of Magna Charta are available. A comparison of texts can be readily accomplished.

Because of John's conduct after Runnymede and its effect on subsequent events, especially the Papal Bull of August 24, 1215, the last sentence of the Articles is important here:

> He [John] shall not procure from our Lord the Pope anything by which any part of these agreements shall be revoked or diminished, and if any such thing be obtained, it shall be regarded as null and void and he shall never make use of it.

In Magna Charta, the foregoing is stated as follows in Chapter Sixty-one:

> And we [the King] shall procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and if any such thing has been procured, let it be void and null, and we shall never use it personally or by another.

The next document in the exhibit case in the British Museum is Magna Charta itself. Of this little need be said here. Its influence as a repository of the rights of Englishmen everywhere grew constantly. It was confirmed over and over again by practically every King of England. With and often without justification every principle of constitutional law has been read into it. "To have produced it, to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind." In time of crisis such as that between the Stuart Kings and Parliament, four hundred years after John granted the Great Charter, its provisions were expounded in support of both contending parties. Lord Edward Coke declared: "Magna Charta is such a fellow that he will have no Sovereign".

The colonists brought its principles to America, and many of those principles have found their way into our Constitution and laws. Just take one illustration, Chapter Thirty-nine of Magna Charta reads:

> No Freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land.

The Fifth Amendment to our Constitution provides that no person shall "be deprived of life, liberty or property, without due process of law" (in Magna Charta, *per legem terre*, the law of the land). And the Sixth Amendment guarantees that in all criminal prosecutions the accused "shall enjoy the right to a speedy and public trial by an impartial jury", (the *per legale judium parium suorum*, the lawful judgment of his peers, in Magna Charta.)

The Articles of the Barons and the Great Charter dramatically portray the times and conditions of life, and the royal abuses. Our Declaration of Independence does the same. Magna Charta and its numerous confirmations enshrined basic principles of liberty and justice for all. Like our Constitution, they became valuable under new and varying conditions. In them all, we look not only into the past, but also peer into the hopes and fears of the future, with security embodied in their provisions.

It was one thing to get from John his written and indisputable promises in the Charter. It was quite another matter to get him to effectuate its conditions and purposes. He had agreed to "procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished". But as soon as the Charter was given at Runnymede, John's messengers were sent on their long trip to Rome to prosecute his appeal and lay before the Pope extracts from the Charter, extracts which the King deemed most likely to influence papal action in his favor.

This, together with John's earlier representations or misrepresentations, produced the fourth document with which we are here concerned, the Papal Bull of August 24, 1215.

The appeal to Rome was only one aspect of John's irreconcilability. He also sent emissaries "beyond the sea" in an effort to raise support and mercenaries on the Continent. Promises were made of "rich pay and ample endowments of English land", property, of course, he proposed to take from his baronage. And in England itself, the royal castles and fortifications were strengthened and supplied with men, arms and food. The "rebels" also prepared for war.

The Roman Church acted too. In a letter of May 29, 1215, John had complained to the Pope, his feudal lord, of the demands being made upon him by "the disturbers of the kingdom", even after he had taken the Crusader's Cross; and all the while, he had not received protec-

2. This translation is the work of Dr. Martin R. P. McGuire, head of the Department of Greek and Latin, The Catholic University of America, Washington, D.C. An earlier translation can be found in "AN HISTORICAL ESSAY ON THE MAGNA CHARTA OF KING JOHN" by Richard Thompson (London 1839) page 49.

tion or aid from the clergy. In a letter dated July 7, 1215,[3] addressed to the Bishop of Winchester, the Abbot of Reading, and Pandulf, the Papal Legate in England, the Pope said he was "forced to express surprise and annoyance" that the Archbishop and bishops had appeared as "accomplices, if not partners, in a wicked conspiracy" against the King. "See how these bishops defend the patrimony of the Roman Church! See how they protect Crusaders! See how they combat the men who are working to destroy the Crusade! Those men are undoubtedly worse than the Saracens, for they are trying to depose a king who, it was particularly hoped, would succor the Holy Land!" Excommunicate "all such disturbers of the king and kingdom of England together with their accomplices and supporters"; lay "their lands under ecclesiastical interdict". That was an order.

The three executors of that papal mandate actually excommunicated by name several of the baronial leaders. Then they went to Langton insisting that he should order the publication of the Pope's sentence throughout his see. He refused. He answered that he believed the sentence was the result of a misconception of the facts and that therefore he would do nothing until he personally had spoken to the Pope. He would go to Rome at once. Thereupon Pandulf and Peter, Bishop of Winchester, denounced him for disobedience to the mandate of the Church. They went further. They suspended him from his office as Archbishop of Canterbury!

Langton, disappointed at the bellicose turn of affairs in England and desiring to confer with the Pope and also attend a council of cardinals, obtained the King's permission to journey to Rome.

Undoubtedly Innocent and his advisers were wise and experienced men. But they did not know John. Either blinded by the King's pretended crusade—and a crusade was the Pope's great hope—or misled by John's presentation of only one side of the controversy, the Pope hurried to the aid of his vassal. He wrote the Papal Bull of August 24, 1215.[4]

## The Papal Bull . . . *August 24, 1215*

This was an open letter, addressed to "all the faithful in Christ who will see this document". It was long, explanatory and decisive.

It recited that John had yielded to St. Peter and the Roman Church his kingdoms of England and Ireland and had received them back "as fief under an annual payment of one thousand marks, having sworn an oath of fealty" to the Church. Also "he reverently assumed the badge of the life-giving Cross, intending to go to the relief of the Holy Land—a project for which he was splendidly preparing. But the enemy of the human race, who always hates good impulses, by his cunning wiles stirred up against him the barons of England so that, with wicked inconsistency, the men who supported him when injuring the Church rebelled against him when he turned from his sin and made amends to the Church." These barons had refused to conciliate the King by manifest proofs of loyalty and submission, refused to render "customary services" (military aid or payment of scutage) "occupying and devastating his territory and even seizing the city of London, the capital of the kingdom, which had been treacherously surrendered to them". All these things were to the prejudice of the Church since the lordship of the kingdom belonged to the Roman Church.

Furthermore, the bull recited, "When the archbishop and bishops would not take any action, seeing himself bereft of almost all counsel and help, he did not dare to refuse what the barons had dared to demand. And so by such violence and fear as might affect the most courageous of men, he was forced to accept an agreement which is not only shameful and demeaning but also illegal and unjust, thereby lessening unduly and impairing his royal rights and dignity."

So, "we utterly reject and condemn this settlement, and under the threat of excommunication we order that the king should not dare to observe it and that the barons and their associates should not require it to be observed: *this Charter, with all undertakings and guarantees whether confirming it or resulting from it, we declare to be null and void of all validity forever. Wherefore let no man deem it lawful to infringe this document of our annulment and prohibition, or to presume to oppose it.*" (Italics are mine.)

But the work of years to obtain the Great Charter of Liberties was not to be nullified by the stroke of a pen. The events of the next eighteen months proved that.

The Archbishop and many of the bishops were out of the country on their way to Rome. No one with sufficient authority was left in England to have the bull published in the churches as custom required. However, its contents became known. The question arose, would the baronage surrender unconditionally or wage war against Pope and King? War was the answer.

Belligerent moves and countermoves followed for months. Even Louis, son of King Philip of France, joined the barons—the throne of England was indeed a powerful magnet.

But food—gluttonously consumed by the King in October of 1216—was the cataclysmic agent. Dysentery, then death in the night of October 18/19, removed John. He was buried in Worcester Cathedral. On his tomb was inscribed:

*Hoc in sarcophago sepelitur regis imago,*
*Qui moriens multum sedavit in orbe tumultum.*
(Within this tomb lies buried a monarch's outward form,
Whose inner man's departure hath stilled war's raging storm).[5]

3. LETTERS, pages 207-209.
4. LETTERS, *supra*, pages 212-216.
5. Kate Norgate, JOHN LACKLAND, page 286.

By his last act, John placed his son Henry, then only nine years old, in the charge of William the Marshal, Earl of Pembroke, because, as the dying King said, "I trust in his loyalty more than in that of any other man." The Earl knighted the child, and on October 28, 1216, this boy became Henry III. He recited the coronation oath: he would render right and justice to all people committed to him, and would abolish bad laws and evil customs and would observe good laws and customs and cause them to be observed by all men. He also did homage to the Church for his kingdoms of England and Ireland. Later he confirmed Magna Charta by a charter of his own.

And what of Langton? In November, 1215, the Pope "confirmed the sentence of suspension promulgated, on apostolic authority, against Stephen, archbishop of Canterbury". It was a bitter climax to a life of service to Church and country. But what Langton saw of his England was equally bitter: a vindictive King waging a remorseless war against his excommunicated barons. And the Great Charter nullified. His love of England and its peace and his deeply-rooted principles had conflicted with his duty as a servant of the Roman Church. The suspension was lifted early in 1216, but on condition that he remain out of England until after the restoration of peace. The Archbishop chose to return in May, 1218. Civil strife was over and Henry III was King, under the able regency of William the Marshal. Langton died in July, 1228.

Those four documents on exhibit in the British Museum are silent but living reminders of the travails, the birth-pangs and the tribulations suffered over 700 years ago. But by and through them Americans today have secured the "blessings of liberty to ourselves and our posterity."

APPENDIX

[The corresponding chapter in Magna Charta is given in brackets at the end of each article.]

THESE ARE THE ARTICLES WHICH THE BARONS PRESENT AND THE LORD KING GRANTS.

1. Following the decease of ancestors, heirs of full age shall have their inheritance by the ancient relief to be described in the charter. [*Magna Charta, c. 2*].

2. Heirs who are under age and are in wardship, when they have come of age shall have their inheritance without relief or fine. [*Magna Charta, c. 3*].

3. The warden of an heir's land shall take only reasonable issues, customs, and services, without destruction and waste of his men or things, and if the warden of such land shall cause destruction and waste, he shall forfeit his wardship. And the guardian shall maintain the houses, parks, fishponds, mills, and all other things belonging to the land, or to the issues thereof, and that the heirs may marry without disparagement and through the counsel of their blood relatives. [*Magna Charta, cc. 4, 5, 6*].

4. No widow shall give anything for her dowry, or for her marriage portion, after the decease of her husband, but she may remain in his house for forty days after his death, and within that period her dowry shall be assigned to her; and she shall have her marriage portion and her inheritance immediately. [*Magna Charta c. 7*].

5. The King or his bailiff shall not seize any land for debt so long as the chattels of the debtor are sufficient; nor shall the sureties of the debtor be distrained as long as the chief debtor is solvent. But if the chief debtor defaults in payment of the debt, the sureties, if they wish, shall have the lands of the debtor until the said debt is paid in full, unless the chief debtor can show that he is quit of this obligation towards the sureties. [*Magna Charta, c. 9*].

6. The King shall not grant to any baron that he may take an aid from his freemen, except for ransoming his body, for knighting his eldest son, and once for marrying his eldest daughter; and he shall do this by a reasonable aid. [*Magna Charta, c. 15*].

7. No one shall render greater service for a knight's fee than is due therefrom. [*Magna Charta c. 16*].

8. Common pleas shall not follow the Court of our Lord the King, but shall be assigned in some certain place, and recognitions shall be taken in the same counties and in this manner: the King shall send two justiciars four times a year, who with four knights of the same county elected by the people thereof shall hold assizes of novel disseisin, of mort d'ancestor, and of darrein presentment, and no one shall be summoned for this except jurors and the two parties. [*Magna Charta, cc. 17, 18, 19*],

9. A freeman shall be amerced for a small offence according to the degree of the offence; and for a grave offence, according to the gravity of the offence, saving to him his contentment; and a villein shall be amerced in the same way, saving his wainage; and the merchant in the same way saving his merchandise; upon the oath of good men of the neighborhood. [*Magna Charta, c. 20*].

10. A clerk shall be amerced according to his lay fee in the manner of those aforementioned, and not according to his ecclesiastical benefice. [*Magna Charta, c. 22*].

11. No town shall be amerced to make bridges for river-banks, except where they were wont to be by right and ancient custom. [*Magna Charta, c. 23*].

12. The measures of wine, grain, and the widths of cloth and of other things shall be amended; and the same shall be done respecting weights. [*Magna Charta, c. 35*].

13. Assizes of novel disseisin and of mort d'ancestor shall be shortened, and the same shall be done respecting other assizes. [*Magna Charta, c. 19*].

14. No sheriff shall of himself enter into pleas belonging to the crown without the crown's consent, and the counties and hundreds shall remain at the ancient rents (ferme) without any increase, except the demesne manors of the King. (*Magna Charta, cc. 24, 25*].

15. If anyone holding of the King dies, a sheriff or other officer of the King shall be permitted, by the view of lawful men, to seize and record the chattels of the deceased, yet in such a manner that nothing shall be removed thence until it shall be fully known whether he owes any certain debt to the King. Then when debt to the King shall be paid, the residue shall be left to the executors for carrying out the will of the deceased; and if nothing is owed the King, all of the goods of the deceased shall be restored. [*Magna Charta, c. 26*].

16. If any freeman dies intestate, his goods shall be distributed by the hands of his nearest relatives and friends and by the view of the Church. [*Magna Charta, c. 27*].

17. Widows shall not be forced to marry so long as they wish to live without a husband; yet they shall give security that they will not marry without the consent of the King if they hold of the King, or without that of the lord of whom they hold. [*Magna Charta, c. 8*].

18. No constable or other officer shall take grain or other chattels, unless he pays immediately in money for the same. (or) unless he can obtain postponement (of payment) by the free will of the seller. [*Magna Charta, c. 28*].

19. No constable shall distrain any Knight to pay money for castle-guard, if he wishes to do the guarding himself, or through another true man if, for reasonable cause, he himself is not able to do it. And if the King shall have sent him in the army, he shall be excused from his castle-guard for that space of time. [*Magna Charta, c. 29*].

20. No sheriff or bailiff of the King, or any other person, shall take the horses or carts of any freeman for carrying service, except with the consent of the freeman himself. [*Magna Charta, c. 30*].

21. Neither the King nor his bailiffs shall take the wood of another for castles or for any other uses, except with the consent of the owner of the wood. [*Magna Charta, c. 31*].

22. The King shall not hold the land of those convicted of a felony, for more than a year and a day; it shall then be returned to the lord of the fee. [*Magna Charta, c. 32*].

23. All weirs shall henceforth be completely removed from the Thames and the Medway and throughout all England. [*Magna Charta, c. 33*].

24. Henceforth the writ called *Praecipe* shall not be granted to anyone concerning any tenement whereby a freeman may lose his court (cause). [*Magna Charta, c. 34*].

25. If anyone has been disseised or dispossessed by the King, without judgment, of his lands, his liberties, or his rights, they shall be restored to him immediately. And if a dispute arises in respect to this matter, let it then be settled by the judgment of the twenty-five Barons. And those who shall have been seised by the father or brother of the King shall have justice without delay according to the judgment of their peers in the King's Court. And if the King ought to have the period of grace granted to other Crusaders, the archbishops and bishops shall then render judgment on the matter on a certain day, and without appeal. [*Magna Charta, c. 52*].

26. Nothing shall be given for the writ of inquisition concerning life and limb, but it shall be issued without charge and shall not be denied. [*Magna Charta, c. 36*].

27. If anyone holds of the King by fee farm, by socage, or by burgage, and of another by Knight's service, the Lord our King shall not have the wardship of the other's Knight's fee,

by virtue of burgage or socage, nor ought he have the wardship of burgage, socage, or fee-farm. And that a freeman shall not lose his Knight's fee by virtue of petit Sergeantry as of those that hold some tenement by rendering for its knives or arrows or something of the sort. [*Magna Charta, c. 37*].

28. No bailiff shall put anyone to law upon his own single accusation without trustworthy witnesses. [*Magna Charta, c. 38*].

29. The body of no free man shall be taken, nor imprisoned, nor disseised, nor outlawed, nor banished, nor destroyed in any way, and the King shall not go or send against him by force, except by the judgment of his peers and by the law of the land. [*Magna Charta, c. 39*].

30. No right shall be sold or delayed or denied. [*Magna Charta, c. 40*].

31. Merchants shall have safe going and coming for buying and selling free from unjust tolls according to right and ancient custom. [*Magna Charta, c. 41*].

32. Scutage or aid shall not be imposed in the realm save by common council of the realm, except for ransoming the body of the King, for knighting his eldest son, and for once marrying his eldest daughter, and for those purposes the aid shall be reasonable. The same provision shall be made regarding the taillage and aids from the city of London and from the other cities that have liberties therefrom. The city of London shall have fully its ancient liberties and free customs both by water and by land. [*Magna Charta, cc. 12, 13*].

33. Everyone shall be permitted, saving the fealty of the Lord King, to leave the realm and return except in time of war, or in the common interest of the realm for a brief period. [*Magna Charta, c. 42*].

34. If anyone has taken anything, either much or little, as a loan from Jews, and if he dies before that debt is paid, the debt shall not bear interest so long as the heir is under age, from whomsoever he may hold. And if that debt falls into the hands of the King, the King shall take only the chattel contained in the bond. [*Magna Charta, c. 10*].

35. If anyone dies and owes a debt to Jews, his wife shall have her dower; and if children survive the deceased, necessities shall be provided for them in proportion to the tenement; and the debt shall be paid from the residue, saving the service of the lords. The same procedure shall be followed concerning other debts. The guardian of the land shall return to the heir, when he attains full age, his land stocked with ploughs and wainnages, according to what the issues of that same land can reasonably produce. [*Magna Charta, cc. 11, 5*].

36. If anyone holds of the King any escheat —such as the honor of Wallingford, Nottingham, Boulogne, Lancaster, and other escheats that are in the hands of the King and are baronies—and if he dies, his heir shall give only such relief and will render only such service to the King as he would render to the baron; and the King shall hold it in the same manner in which the baron held it. [*Magna Charta, c. 3*].

37. Fines which have been made unjustly and contrary to the law of the land for dowries, marriage portions, inheritances, and unjust amercements shall be entirely remitted; or else it shall be decided by the judgment of the twenty-five barons, or by the judgment of the majority of the same, together with the archbishop and others whom he may wish to associate with himself; yet so that, if any one or more of the twenty-five barons are involved in a similar dispute, they shall be removed and others shall be substituted in their places by the remainder of the twenty-five. [*Magna Charta, c. 55*].

38. Hostages and bonds which were delivered to the King as security shall be surrendered. [*Magna Charta, c. 49*].

39. Men dwelling outside a forest shall not, by virtue of a common summons, come before the justiciars of the Forest, unless they are impleaded or are sureties. [*Magna Charta, c. 44*]. And irregular customs of Forests and Foresters and of warreners, and of sheriffs, and keepers of river-banks shall be inquired into by twelve knights of each county, who ought to be elected by good men of the same county. [*Magna Charta, c. 48*].

40. The King shall remove completely from their bailiwicks the relatives and the whole following of Gerard de Athyes, and henceforth they shall not hold office. The same action shall be taken against Engelard, Andrew, Peter and Gyon de Chancell, Gyon de Cygony, Matthew de Martin and his brothers, and his nephew Walter and Philip Marc. [*Magna Charta, c. 50*].

41. And the King shall remove all foreign knights, mercenaries, crossbowmen, and routiers, and sergeants, who came with horses and arms to the injury of the realm. [*Magna Charta, c. 41*].

42. The King shall make justiciars, constables, sheriffs, and bailiffs out of those who know the law of the land and well disposed to observe it. [*Magna Charta, c. 45*].

43. Barons who have founded abbeys, and for which they have charters from kings or by ancient tenure, shall have the custody of these abbeys when vacant. [*Magna Charta, c. 46*].

44. If the King has disseised or dispossessed Welshmen of their lands or liberties, or other things in England or in Wales, they shall be returned to them immediately without plea. And if they have been disseised or dispossessed, without judgment of their peers, of their tenements in England by the father or brother of the King, the King shall give them justice without delay, according to the law of England for their tenements in England, and according to the law of Wales for their tenements in Wales, and according to the law of the Marches for the Tenements in the Marches. Welshmen shall act in the same manner towards the King and his subjects. [*Magna Charta, cc. 56, 57*].

45. The King shall restore the son of Llewelyn, and also all the hostages of Wales, and the bonds that were given as security for the peace . . . unless the action ought to be otherwise by the bonds which the King has entered into, and this shall be settled by the judgment of the archbishop and of others whom he may wish to associate with himself. [*Magna Charta, c. 58*].

46. The King shall act towards the King of the Scots in respect to the return of hostages, to his liberties, and to his rights, in the same way as he acts towards the barons of England. [*Magna Charta, c. 59*].

47. And all forests that have been afforested by the King in his time shall be deforested, and the same shall be done regarding river-banks that have been fenced in by the King himself. [*Magna Charta, c. 47*].

48. Now all these customs and liberties which the King has conceded are to be held in the realm as concerns his relations towards his men, all clergy and laity in the realm, shall observe, in so far as it concerns them, towards their dependents. [*Magna Charta, c. 60*].

49. *This is the form of security* for observing the peace and liberties between the King and the realm. [*Magna Charta, cc. 61, 2, 3*]:

The barons shall choose twenty-five barons of the realm, whomsoever they will, who, to the best of their power are to observe, keep, and cause to be observed, the peace and liberties which the Lord King has conceded and has confirmed by his charter; so that, to wit, if the King, or the justiciaries or the bailiffs of the King, or any of his ministers shall fail to perform them in any respect toward any one, or transgresses any of the articles of the peace or security, and if the delinquency is shown to four Barons of the aforementioned twenty-five, those four Barons shall go to the King, or to his justiciary if the King is out of the realm, and, having explained the wrong to him they shall ask that he shall cause that wrong to be redressed without delay. And if the King does not redress it, or if his justiciary does not redress it if the King is out of the realm, within a reasonable time to be determined in the Charter, the four barons aforementioned shall refer that case to the remainder of those twenty-five Barons, and those twenty-five, together with the community of the whole country, shall distrain and distress the King in every way possible—to wit, by capturing his castles, lands, and possessions, and in every other way they can—until redress is obtained according to their decision, saving the persons of the lord King, of the Queen, and of their children. And when redress has been made, they shall obey the lord King as before. And any one in the land who is willing shall swear that, for carrying out the things aforesaid, he will obey the commands of the twenty-five Barons aforesaid, and that he, with his own men, will harass the King to the best of his power; and the King publicly and freely shall give the permission to swear to anyone who wishes, and he shall not prohibit any one from swearing. Furthermore, all those of the land who of themselves and of their own free will refuse to swear to join with the twenty-five Barons respecting distraining and distressing the King, these same the King shall, by his mandate, cause to swear as aforesaid. Again, if any one of the twenty-five Barons dies, or departs from the land, or is prevented in any other way from carrying out the aforesaid decisions, the rest of the twenty-five Barons shall, in accordance with their own decision, elect another in his place, and he shall be sworn in the manner as the others. Moreover, in all the matters entrusted to those twenty-five barons for execution, if, when the twenty-five themselves are assembled and are in disagreement among themselves on some point, or if some of those summoned are unwilling to be or cannot be present, what the majority provide or command shall be held as valid and binding, as if all twenty-five had signified agreement. And the twenty-five aforesaid shall swear that they will faithfully observe, and cause to observed, to the best of their power, all that has been said above. And further, the King shall confirm their security by letters of the Archbishop and the Bishops and Master Pandulf, and he shall not procure from our Lord the Pope anything by which any part of these agreements be revoked or diminished; and if he shall obtain any such thing of this kind, it shall be regarded as null and void and he shall never make use of it.

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*Latin Text* in W. Stubbs, SELECT CHARTERS (8th ed. revised throughout by H. W. C. Davis. Oxford: At the Clarendon Press 1913, and New Impression with correction, 1929.) pages 284-291. Stubbs took the Latin from BLACKSTONE'S CHARTERS, pages 1-9, and STATUTES OF THE REALM: CHARTERS OF LIBERTIES, page 6.

There is a good translation of *Magna Charta* in: C. Stephenson and F. G. Marcham, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY. A SELECTION OF DOCUMENTS FROM A.D. 600 TO THE PRESENT. New York - London, 1937 (Harper and Brothers) pages 115-126.

The *Articles* and *Magna Charta* are to appear in translation in ENGLISH HISTORICAL DOCUMENTS (Ed. by David C. Douglas and Others, 1954 *ff*).—Vol. II, 1189-1327. No date of publication for this volume has been announced.

*(Continued from page 506)*

of the shares is $8 and that it is ultimately successful in establishing this value. This would create a gift tax liability of $787.50, or $720 more than anticipated on the basis of the valuation data furnished by Mr. *G*. However, the "gifts-to-charity hedge" simultaneously works to reduce his income tax to $4,683, or some $1,729 less than the amount which he would have returned under our hypothetical case, thus more than offsetting the gift tax deficiency.

## The Federal Estate Tax Deduction

The federal estate tax deduction for charitable bequests and devises can be used in a like manner in a situation of this sort. This time, let us assume that Mr. *H*, the testator, is a single man; that he estimates his net worth to be about $300,000; that his assets are made up primarily of his shareholdings in *B* Company, a family concern; that he desires to turn over control of that business to his nephew; and that both he and his company are presently relatively short of cash. You advise him that an outright testamentary transfer of his entire estate to his nephew will create a federal estate tax liability of about $60,000. He indicates that this is more than it is presently feasible for either his estate or company to raise in cash on short notice except through forced sale of the securities. In this situation a bequest of one third of the shares of the company to a college would cut the federal death tax approximately in two. Obviously, this would be more within the cash capabilities of the estate and *B* Company through the stock redemption process.

## Testamentary Gifts

Ordinarily it is more advantageous for a donor to make a living rather than testamentary gift to education. Oliver Wendell Holmes humorously expressed such a thought when he wrote:

> Learn to give
> Money to Colleges while you live.
> Don't be silly and think you'll try
> To bother the colleges, when you die,
> With codicil this, and codicil that,
> That knowledge may starve while the Law grows fat;
> For never was a pitcher that wouldn't spill,
> And there's always a flaw in a donkey's will.

Nonetheless death tax advantages derived from bequests and devises are substantial.

The estate tax deduction for charitable gifts reduces the actual cost of donations.[33] This deduction comes off the top of the estate, removing the amount of the contribution from the impact of the highest rates of taxation.

For example, Mr. *I*, a single person who has a taxable estate of $50,000, makes a bequest of $10,000 to a university. His estate tax without the bequest would be $7,000, but with the $10,000 excluded from his estate, the tax is reduced to $4,800. The actual net cost of the bequest is only $7,800.[34] Of course, the tax savings are greater in larger estates.

For certain donors a devise to a college or university of real property that is difficult to sell for the appraised value has proved advantageous. Ordinarily the property might have to be sold quickly, at less than actual value, in order to provide cash for the payment of taxes. By giving the property to an educational institution the value of the real property is excluded from the taxable estate, and thereby the amount of the estate tax is reduced.



A testamentary trust is a useful device for a donor who wishes to defer his gift until sometime after his death. Suppose Mr. *I* desires that his former college receive his estate eventually but is concerned over the needs of his wife and children during their lives or a certain number of years. By establishing a testamentary trust the income therefrom may be paid to the life beneficiaries, with the remainder to the college or university. Death taxes are payable only on the life interests, based on their life expectancies at Mr. *I*'s death.

## Corporate Gifts

The actual costs of gifts made by corporations to education is substantially less than the amount of the contribution because of favorable tax laws. Corporations are allowed to deduct charitable contributions up to 5 per cent of their taxable income.[35] They may even carry over excess contributions (over the 5 per cent limitation) for the two years next succeeding the taxable year to the extent that the carryovers and contributions in each of those years do not exceed 5 per cent of the tax-

33. Int. Rev. Code of 1954, §2055 (a)(2).
34. Int. Rev. Code of 1954, §2001.
35. Int. Rev. Code of 1954, §170(b)(2).

able income.[36] This provision is useful to corporations that wish to make contributions early in the tax year. Most states now have statutes authorizing corporations to make charitable donations for educational purposes, although most restrict the amount that corporations may give. The legal basis of corporate gifts to education has been discussed previously in this magazine.[37]

## Details Sometimes Overlooked

In advising as to the form which the benefaction should take and in drafting the instrument of conveyance, the lawyer can be of great help to both donor and donee. Review of a number of such documents leads me to make certain suggestions of a general nature.

Care should be taken to designate the trustee or beneficiary properly. This admonition is prompted by a recent bequest of a lady domiciled in Massachusetts in favor of "Southern University of Los Angeles, California," wherein are located the University of Southern California, the University of California at Los Angeles, and Southwestern University, but no "Southern University." Many of our institutions of higher learning have similar names, *e.g.*, Miami University in Ohio, and University of Miami in Florida, Boston College and Boston University, the many Loyolas, etc. As incongruous as it may seem to those intimately acquainted with our colleges, institutions are often confused with one another by benefactors.

Generally, fiduciaries may not lawfully pool for investment purposes funds turned over to them by different trustors, at least in the absence of specific authority to do so.[38] Not infrequently the purposes of the benefactor may be carried out more fully and safely where such pooling is permitted, particularly where the corpus is relatively small. Therefore, consideration should be given to the advisability of including a provision authorizing investment in such manner.

If a gift or bequest is made for a restricted purpose, that purpose should be stated in as broad terms as possible in order that changing conditions may not impair the usefulness of the donation or make impractical the attainment of the donor's objectives. The present-day surplus of assets limited in use to student loans in some of our colleges is a case in point. *Cy pres* is probably available, but who can say that all of these monies will not be needed shortly in view of the predicted increase in college enrollment. In the meantime, considerable sums lie idle. It is advisable in cases such as loan funds to include permission for a change in use of the fund to some other closely related purpose if the donee should find that the original need is either temporarily met or no longer exists.

Income trusts for the benefit of a family or dependents commonly contain express authority for the invasion of corpus in the event of emergency. Many of our institutions of higher learning are operating with deficits, or soon will be. The merits of including a like clause in a charitable or educational endowment should be considered.

At common law, a voluntary, living trust is generally regarded as irrevocable unless the trustor expressly reserves the power of revocation.[39] However, this rule has been changed by statute in some states, and in those jurisdictions such a trust is revocable unless expressly made irrevocable.[40] Since the status of such a trust has a marked bearing on the amount of the deduction for charitable contributions which the creator successfully may claim for income tax purposes,[41] it behooves the lawyer to weigh the matter and take action in accordance with the best interests of his client.

## The Challenge

This nation can ill afford to waste the reservoir of mind and skill of our coming college generations. But to meet their obligations and realize their opportunities, our institutions of higher learning must rely on private sources for financial support in increasing amounts. The members of the legal profession can be a potent force in meeting this challenge by acquainting clients with the low cost of giving by use of available tax techniques.

Actually financial contributions to our colleges and universities should not be viewed as charity at all but as participation in the strengthening of our nation. Only through an enlightened citizenry may we preserve our freedom. Former President Calvin Coolidge well expressed the thought that an investment in education is an investment in the future when he declared:[42]

> To place your name by gift or bequest in the keeping of an active university is to be sure that the name and project with which it is associated will continue down the centuries to quicken the minds and hearts of youth, and thus make a permanent contribution to the welfare of humanity.

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36. *Ibid.*
37. Bell, *Corporate Support of Education: The Legal Basis*, 38 A.B.A.J. 119 (1952); De Capriles and Garrett, *Legality of Corporate Support to Education: A Survey of Current Developments*, 38 A.B.A.J. 209 (1952); Bleicken, *Corporate Contributions to Charities: The Modern Rule*, 38 A.B.A.J. 999 (1952); see note 12 *supra*.
38. 90 C.J.S., Trusts, §329 (1955).
39. Annot. 131 A.L.R. 457 (1941).
40. See, *e.g.*, Cal. Civ. Code. §2280.
41. *Cf. First National Bank of Boston* v. *Commissioner*, 25 B.T.A. 252 (1932); *John Danz*, 18 T. C. 454 (1952); *U. S.* v. *Weed*, 110 Fed. Supp. 149 (1952).
42. The Pennsylvania State University, YOUR CREATIVE WILL (1954).

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### Activities of Sections

*(Continued from page 557)*

Torem of the Paris Bar, Gerald J. McMahon, Secretary General of the International Bar Association, Richard N. Gardner, Associate Professor at the Columbia Law School, and Paul Carrington and Ray Garrett, both past Chairmen of the Section of Corporation, Banking and Business Law. Consideration is also being given to the formation of a Committee on Savings and Loan Law, a field which has witnessed much activity in recent years.

As indicated in these pages in last month's JOURNAL, on July 11, 1957, at 2:30 P.M., our Section will present, in the Jade Room of the Waldorf-Astoria, an arbitration dramatization as part of its New York program for the Annual Meeting. A most distinguished cast has now been signed for the play, which is aptly entitled "Bar, Bench and Table—An Arbitral Drama", including Edward J. Dimock and Thomas F. Murphy, Judges of the United States District Court for the Southern District of New York; Bruce Bromley, former Judge of the Court of Appeals of the State of New York; Leffert Holz, Superintendent of Insurance of the State of New York; Joseph N. Welch, of the Boston Bar and of Senate Committee and "Omnibus" fame; Harold J. Gallagher, past President of the American Bar Association; Harrison Tweed and John Stuart Dudley of the New York Bar; Joseph S. Murphy, Vice President of the American Arbitration Association; and William Zeckendorf, well-known real estate man, President of Webb and Knapp, Inc.

Immediately preceding the arbitration session, a Section luncheon will be served at 12:15 P.M. in the East Foyer adjoining the Jade Room in the Waldorf-Astoria. Frederic W. Ecker, President of Metropolitan Life Insurance Company and Chairman of the Insurance Committee of President Eisenhower's Program for People-to-People Partnership, will speak on "A Road to Enduring Peace". Because of space limitations, those planning to attend are urged to make advance reservations for the luncheon.

On Friday, July 12, our Division of Food, Drug and Cosmetic Law will hold in Vanderbilt Hall Auditorium at the New York University School of Law, 40 Washington Square South, a session starting at 9:30 in the forenoon and another at 2:00 in the afternoon. A Dutch treat luncheon will be served in the adjoining Hayden Hall after the morning session. Charles Wesley Dunn, Chairman of the Division, will preside at the sessions and introduce the many distinguished authorities in the food, drug and cosmetic field enlisted by him as speakers for the occasion. Among those participating will be John L. Harvey, Deputy Commissioner of Food and Drugs; Assistant General Counsel William W. Goodrich of the Department of Health, Education and Welfare; A. R. Miller of the Department of Agriculture; H. J. Anslinger, Commissioner of Narcotics; C. A. Morrell of the Canadian Department of National Health and Welfare; Charles A. Sweeny, Federal Trade Commission Project Attorney; and Dr. Harold Kautz, American Medical Association. Among the practicing lawyers taking part will be E. B. Williams, V. A. Kleinfeld, Bradshaw Mintener and Michael F. Markel, all of Washington, D. C., R. G. Moser and W. F. Weigel, of New York, and Melvin E. Mensor, of San Francisco.

Those planning to attend our panel on Ship Financing to be held in New York on the morning of July 11, 1957, are urged to read two articles on the subject which appeared in the January, 1957, issue of *The Business Lawyer*. Similarly, all members who intend to go to London and to attend the July 25 panel discussion on "Corporate Financing in Great Britain" will find the paper on this subject that will appear in the next issue of *The Business Lawyer* an interesting and stimulating foundation for an appreciation of the discussion.